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In The
Supreme Court of the United States

JOSE PADILLA,

Petitioner,

v.

COMMANDER C.T. HANFT,
U.S.N., COMMANDER,
CONSOLIDATED NAVAL BRIG,

Respondent.

On Petition For Writ Of Certiorari Before Judgment To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF PETITIONER FOR WRIT OF CERTIORARI BEFORE JUDGMENT

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QUESTION PRESENTED

Does the President have the power to seize American citizens in civilian settings on American soil and subject them to indefinite military detention without criminal charge or trial?

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

No party to this habeas corpus petition is a corporation or controlled by a corporation.

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PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT

Mr. Jose Padilla petitions for a writ of certiorari before judgment in a case pending on appeal to the United States Court of Appeals for the Fourth Circuit.

OPINION BELOW

The slip opinion of the district court is reported at 2005 WL 465691.

JURISDICTION

The judgment of the district court was entered on March 4, 2005. The notice of appeal was filed on March 11, 2005. The case was docketed in the court of appeals on March 22, 2005, as No. 05-6396. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2101(e).

STATEMENT OF THE CASE

This Court is familiar with the facts of this case, having received full briefing and argument on the merits just one year ago. *See Rumsfeld v. Padilla*, 124 S.Ct. 2711 (2004). Jose Padilla, a U.S. citizen arrested at Chicago O'Hare Airport in May 2002, has now been held in military custody for nearly three years without criminal charge. The Executive Branch claims the authority to subject him to military detention without charge until the indefinite end of the "War on Terror."

Padilla was originally arrested on a material witness warrant issued by the U.S. District Court for the Southern District of New York. He was being held in a civilian detention facility in New York when, in June 2002, the President declared him an "enemy combatant" and ordered his seizure by the military. Immediately after he was seized, Padilla's court-appointed New York attorneys filed a habeas petition on his behalf in the court there. The U.S. District Court for the Southern District of New York accepted the Executive Branch's claim that it had authority under the Authorization for Use of Military Force ("AUMF"), Pub. L. 107-40, 115 Stat. 224 (2001),[1] to detain U.S. citizens arrested in the U.S. as enemy combatants, but held that Padilla was entitled to access to a lawyer and to a factual hearing. *Padilla ex rel. Newman v. Bush*, 233 F. Supp.2d 564 (2002).

The U.S. Court of Appeals for the Second Circuit reversed, holding that the President had no constitutional or statutory authority to detain indefinitely without criminal charge U.S. citizens arrested in the United States. *Padilla v. Rumsfeld*, 352 F.3d 695 (2003). Relying on constitutional history and structure, as well as the Non-Detention Act, 18 U.S.C. § 4001(a),[2] the Second Circuit found a strong

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[1] The AUMF provides in relevant part: "[T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." 115 Stat. 224.

[2] The Non-Detention Act provides: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." 18 U.S.C. § 4001(a).

presumption against the domestic military detention of citizens that was not overcome by Congress's authorization of "necessary and appropriate force" in the AUMF. *Id.* at 710-22. Accordingly, the court found that Padilla must be charged with a crime, detained in some other legally authorized status (e.g., as a material witness), or released.

This Court granted certiorari. *Rumsfeld v. Padilla*, 540 U.S. 1173 (2004). After full briefing and argument on the question of Presidential authority – the identical question presented by the current petition – a majority of the Court held that the case should have been filed in South Carolina rather than New York. 124 S.Ct. at 2727 (2004).

In accordance with this Court's decision, Padilla immediately refiled his petition in South Carolina, the district of his present military incarceration. On February 28, 2005, the U.S. District Court for the District of South Carolina reached the same conclusion that the U.S. Court of Appeals for the Second Circuit had reached more than a year before, finding no legal authority for Padilla's military detention. *Padilla v. Hanft*, 2005 WL 465691 (D.S.C. Feb. 28, 2005).

The district court carefully reviewed this Court's decision in *Hamdi v. Rumsfeld*, 124 S.Ct. 2633 (2004), and ultimately concluded that the differences between Hamdi's overseas battlefield capture and Padilla's civilian arrest in the United States were "striking." 2005 WL 465691, at *6 (App. at 13a). *See also Hamdi v. Rumsfeld*, 337 F.3d 335, 344 (4th Cir. 2003) (Wilkinson, J., concurring) (noting that "[t]o compare this battlefield capture [in Hamdi] to the

domestic arrest in *Padilla v. Rumsfeld* is to compare apples and oranges.").[3] The district court thus concluded that Padilla's nearly three-year-long military detention was neither a "necessary" nor an "appropriate" use of military force within the meaning of the AUMF. 2005 WL 465691, at *7 (App. at 15a). Like the Second Circuit, the district court also rejected the government's argument that *Ex parte Quirin*, 317 U.S. 1 (1942), supported Padilla's detention. *Padilla v. Hanft*, 2005 WL 465691, at *7 (App. at 16-17a). The district court noted that in *Quirin*, Congress had "'explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases,'" *Id.* at *8 (App. at 17a) (quoting *Quirin*, 317 U.S. at 28). As this Court found in *Hamdi*, the AUMF necessarily authorizes the detention of combatants captured on overseas battlefields, something that the laws of war allow and that has been customary in past wars in which the United States has been involved. But the AUMF cannot be read to speak with comparable clarity to the detention without trial of U.S. citizens arrested in civilian settings here at

[3] *Cf. Hamdi*, 124 S.Ct. at 2642 n.1 ("[T]he basis asserted for detention by the military is that Hamdi was carrying a weapon against American troops on a foreign battlefield; that is, that he was an enemy combatant."); *id.* at 2643 (responding to Justice Scalia's dissent by noting that "Justice Scalia largely ignores the context of [*Hamdi*]: a United States citizen captured in a *foreign* combat zone.") (emphasis in original); *id.* at 2642 (noting that the petitioner in *Ex parte Milligan*, 71 U.S. 2 (1866), "was not a prisoner of war, but a resident of Indiana arrested while at home there" for plotting acts of sabotage and had "Milligan been captured while he was assisting Confederate soldiers by carrying a rifle against Union troops on a Confederate battlefield, the holding of the Court might well have been different.").

home, something that has not been a traditional part of this nation's wartime practice.[4]

Having found Padilla's detention not authorized by the AUMF, and prohibited by the Non-Detention Act, the district court also rejected the government's argument that Padilla's detention was supported by inherent presidential power, concluding that such power would "offend the rule of law and violate this country's constitutional tradition." 2005 WL 465691, at *11 (App. at 25a) (*citing Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 644 (1952) (Jackson, J., concurring)). Accordingly, the district court ordered that Padilla be released from military custody within 45 days, noting that "[o]f course, if appropriate, the Government can bring criminal charges against Petitioner or it can hold him as a material witness." *Id.* at *13 & n.14 (App. at 29a).

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[4] The district court found at least five other differences between the instant case and *Quirin*:

> 1) In *Quirin*, Mr. Quirin was charged with a crime and tried by a military tribunal. In the instant case, Petitioner has not been charged and has not been tried.
>
> 2) *Quirin* involves a prisoner whose detention was punitive whereas Petitioner's detention is purportedly preventative.
>
> 3) *Quirin* is concerned more with whether the petitioner was going to be tried by a military tribunal or a civilian court. The case at bar is concerned with whether Petitioner is going to be charged and tried at all.
>
> 4) The decision in *Quirin* preceded the Non-Detention Act.
>
> 5) *Quirin* involved a war that had a definite ending date. The present war on terrorism does not."

Id. at *8 n.10 (App. at 18a) (noting that the differences "are not limited to" these five).

The government filed a notice of appeal in the Fourth Circuit on March 11, 2005. (App. at 30a).

REASONS FOR GRANTING THE PETITION

There is no debate over the imperative public importance of the legal issue presented here. *See* Gov't Pet. for Cert., *Rumsfeld v. Padilla*, at 11 (arguing that because it "resolves issues of extraordinary national significance, the decision self-evidently warrants this Court's review"). Over a year ago, this Court found that the President's claim of the power to seize a citizen in a civilian setting in the United States and detain him indefinitely in a military prison merited not only certiorari but also an expedited briefing schedule. No member of this Court denied that Jose Padilla's petition for a writ of certiorari raised an issue that was, as the majority stated, "indisputably of profound importance." *Rumsfeld v. Padilla*, 124 S.Ct. at 2727 (citation omitted). Echoing those words, the four dissenting justices found that "[a]t stake in this case is nothing less than the essence of a free society." *Id.* at 2735 (Stevens, J., dissenting).

Nothing has changed – except that the uncertainty over this question of imperative public importance remains, and a citizen has parceled out another year of his life in the shadow of that uncertainty. So has the Nation. This Court's finding last June that the district court in New York lacked jurisdiction over Padilla's petition required that the petition be dismissed and refiled in South Carolina. Now with that jurisdictional impediment removed, this Court again has the opportunity to address

the profoundly important question raised by this case. There is no reason to delay its resolution a moment longer, since further delay poses real risks to security and liberty.

Since the Court last heard the case, the immediate practical implications for the administration of justice have only increased, making it imperative that the Court not only hear the case, but hear it now. As explained below, the threat of "enemy combatant" status currently looms over every criminal prosecution for terrorism-related offenses, affecting plea negotiations in all such cases. The longer this Court delays resolving the question whether U.S. citizens arrested in the United States can be indefinitely detained as "enemy combatants," the longer a cloud of uncertainty will hang over this vitally important part of the criminal justice system. Moreover, the public remains in doubt about the division of responsibility among the branches of the federal government for setting U.S. policy on the treatment of citizens suspected of association with terrorist organizations, undermining the healthy functioning of democratic processes that are vital to the rule of law. At the same time, the normal factors weighing in favor of delaying certiorari – including the wisdom of waiting for thorough percolation of an issue through the lower courts – are not present here, where the case has already gone through the appellate process once and the merits of the case have been fully briefed and argued before this Court.

A. This Case Is Of Imperative Public Importance

A petition for a writ of certiorari before judgment will be granted "only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate

determination in this Court." Sup. Ct. R. 11. This case meets the stringent standard of that Rule for three independent reasons. First, it raises urgent questions about the reach of the President's military power over American citizens on American soil during military conflict. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 937 (1952) (certiorari before judgment granted); *Ex parte Quirin*, 317 U.S. 1 (1942) (certiorari before judgment granted). Second, it raises pressing questions about the relationship of the Executive branch to its coordinate federal branches. *See United States v. Nixon*, 417 U.S. 927 (1974) (certiorari before judgment granted). Finally, it has critically important implications for the ongoing administration of criminal justice. *See Mistretta v. United States*, 488 U.S. 361 (1989); *United States v. Fanfan*, 125 S.Ct. 12 (2004) (certiorari before judgment granted). Any one of these grounds would warrant a grant of certiorari before judgment – as this Court's grants of certiorari before judgment in the cases cited above make plain. Here, all three are present, making an immediate grant of certiorari appropriate.[5] While the U.S. District Court for the District of South Carolina necessarily and correctly decided the fundamental constitutional questions involved in this case, the Nation requires that this Court authoritatively confirm that decision at the earliest possible moment.

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[5] This Court has granted certiorari before judgment whether it is sought by the party that won or lost in the district court. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (prevailing party); *United States v. Nixon*, 418 U.S. 683, 686-87, 690 (1974) (same); *United States v. United Mine Workers*, 330 U.S. 258, 269 (1947) (same); *United States v. Bankers Trust Co.*, 294 U.S. 240, 294-295 (1935) (same); *see also* Robert L. Stern, et al., *Supreme Court Practice* 78 (8th ed. 2002).

1. This case raises urgent questions about the President's military power over American citizens on American soil.

As things stand – and as they will continue to stand for some time in the absence of a grant of certiorari before judgment – no one knows the extent of the President's military power over American citizens at home during the "War on Terror." The continuing uncertainty about an issue of such imperative public importance does not serve the American people or its government. There would seem few more important tasks for this Court than alleviating that uncertainty as soon as possible, so that the two political branches can discharge their duty to safeguard both the physical security of this nation's citizens and the American tradition of freedom.

Neither security nor freedom is served by the continuing shroud of uncertainty that hangs over the question whether the President may seize American citizens in civilian settings on American soil and subject them to indefinite military detention without criminal charge. In the absence of any ruling from this Court, the Executive branch has argued that the "enemy combatant" label can be broadly applied. Executive branch lawyers have maintained that a "little old lady" who sent a check to "what she thinks is a charity that helps orphans in Afghanistan" could be detained in military custody indefinitely, without criminal charge or trial, if unbeknownst to her the donation was passed on to terrorists. Tr. of Hr'g at 25, *Rasul v. Bush* (D.D.C. Dec. 1, 2004) As the Deputy Associate Attorney General starkly stated, "someone's intention . . . is not a factor that would disable the military from detaining the individual as an enemy combatant." *Id.* Later in the argument, the Department of Justice attorney stated that

a teacher who taught English to the son of a terrorist could also be militarily detained, indefinitely without charge, because "Al Qaeda is seeking to train its operatives to learn English." *Id.* at 27. In the Executive's view – in its own words – teaching English to terrorists' children is tantamount to "shipping bullets to the front lines," and transforms a teacher into an "enemy combatant." *Id.*

If the President has such power over the nation's citizens, then the President should know that with certainty as soon as possible. Equally important, American citizens and their Congressional representatives should know it as soon as possible – so that they can regulate or withdraw the power as they see fit.

This Court has granted certiorari before judgment several times in order to bring immediate finality to questions of the President's military power over citizens. In *Kinsella v. Krueger*, 351 U.S. 470, 473 (1956), for instance, this Court granted certiorari before judgment to determine whether spouses of servicemembers could be subjected to military trials. Likewise, in *Quirin*, 317 U.S. at 19, this Court granted certiorari before judgment in order to determine whether the President was empowered to charge and try suspected combatants in a military justice system. *See also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (considering extent of Presidential power over Americans on American soil during wartime). The issues presented in this case demand equally prompt resolution by this Court.

2. This case raises pressing questions about the relationship of the Executive branch to its coordinate Federal Branches.

This Court has several times granted certiorari before judgment in order to resolve pressing questions about the allocation of powers between coordinate branches of government, particularly where the power at issue touches on national security or foreign affairs. *See Quirin*, 317 U.S. at 24-29 (considering whether Congress authorized Executive's trial and punishment of saboteurs by military commission); *Youngstown Sheet & Tube Co.*, 343 U.S. at 585-89 (considering whether Executive could seize citizens' property during wartime in manner inconsistent with Congressional statute); *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (considering Executive power to resolve private claims against foreign government arising out of revolution); *see also* William H. Rehnquist, All the Laws But One 118 (1998).

As this Court knows from last year's briefing and argument, this case raises profound and pressing questions about the balance of powers between Congress and the President. The District Court here confirmed the existence of those profound and pressing questions, noting that accepting the government's position "would not only offend the rule of law and violate this country's constitutional tradition, but it would also be a betrayal of this Nation's commitment to the separation of powers that safeguards our democratic values and individual liberties." 2005 WL 465691, at *12 (App. at 26a). *See also id.* at 16-19 (finding that military detention of Padilla without criminal charge or trial directly contradicts expressed will of Congress.) In the absence of a definitive resolution of the issues presented in this case – which only this Court can

give – neither the President nor the Congress can be sure of their respective powers and duties in shaping the nation's response to terrorism, an uncertainty that does profound disservice to the American people and the democratic political process.

3. Delaying consideration of this case would impair the ongoing administration of criminal justice.

This Court has granted certiorari before judgment to provide clarity on an issue with far-reaching ramifications for the administration of justice. *See Mistretta*, 488 U.S. at 371; *United States v. Fanfan*, 125 S.Ct. 12 (2004). Continued uncertainty about the answer to the central question in this case has had significant effects in terror-related criminal prosecutions nationwide. A grant of this petition for certiorari before judgment would stop the mushrooming effect of that uncertainty.

Since Padilla's military seizure from the civilian prison in which he was held, federal terrorism prosecutions have occurred under explicit or implicit Executive threats to declare criminal suspects enemy combatants and detain them in military prisons without criminal trial. As many media reports have shown, the Executive utilizes uncertainty over the extent of its military power in negotiations over guilty pleas. *See generally* Adam Liptak, *Threats and Responses: The Legal Context; Tribunals Move From Theory to Reality*, N.Y. TIMES, July 4, 2003, at A12.

The threat of an enemy combatant designation has loomed over many domestic terrorism prosecutions. The defense counsel for Iyman Faris, the "Brooklyn Bridge saboteur," reported that Faris was threatened with enemy

combatant status and indefinite military detention at Guantanamo Bay before agreeing to a plea bargain. Eric Lichtblau, *Trucker Sentenced to 20 Years in Plot Against Brooklyn Bridge*, N.Y. TIMES, Oct. 29, 2003 at A1. Similarly, lawyers for the "Lackawanna Six" of Buffalo, New York, reported that the threat of enemy combatant status weighed heavily in their clients' decisions to plead guilty. Michael Powell, *No Choice But Guilty: Lackawanna Case Highlights Legal Tilt*, WASH. POST, July 29, 2003, at A1. Most recently, an FBI agent who testified in pre-trial proceedings for Ahmed Abu Ali (accused of plotting to assassinate the President) conceded that Abu Ali initially invoked his constitutional right to counsel but withdrew his demand after agents told him he could be detained as an enemy combatant. Tr. of Hr'g at 60, *United States v. Abu Ali* (E.D. Va. Mar. 1, 2005) (Cr. No. 05-53) (App. at 31a). Indeed, the government has put these explicit threats down on paper: one of the first post-9/11 defendants, John Walker Lindh, entered into a plea agreement that plainly stated the government would seize and detain him as an "enemy combatant" if he again engaged in similar illegal conduct. *See* Plea Agreement, *United States v. Lindh*, No. 02-37A (E.D. Va.), *available at* http://news.findlaw.com/hdocs/docs/lindh/uslindh71502pleaag.pdf. Despite these explicit threats, this Court will not likely hear a direct challenge from any of these defendants, since the government has required the defendants to waive their right to appeal their sentences. *See id.*

Even when the Executive acts without making an explicit threat, it benefits from the implicit threat – as government officials have themselves acknowledged. After

the Executive declared Ali al-Marri an enemy combatant and transferred him to the military brig in Charleston, South Carolina – just weeks before the scheduled start of his criminal trial – a senior F.B.I. official reportedly said that the move held clear implications for other terrorism suspects: "If I were in their [suspects'] shoes, I'd take a message from this." Eric Lichtblau, *Wide Impact from Combatant Decision Is Seen*, N.Y. TIMES, June 25, 2003, at A14. The message is clear: plead guilty to the crime, or be punished for it anyway by being imprisoned as an enemy combatant.

Our criminal justice system has long countenanced prosecutors' threats to bring more serious charges, including death-penalty eligible charges, as a part of plea bargaining. But it has never permitted prosecutors to threaten illegal punishments in order to secure a guilty plea. Such threats would, at a minimum, raise serious questions about the voluntariness of guilty pleas. Yet as things stand, no one – neither prosecutors nor defendants – knows whether a threat to declare a criminal suspect an enemy combatant is a threat to do a legitimate act (as with a threat to bring death-penalty eligible charges) or a threat to do an ultra vires act (as with a threat to torture the suspect).

By determining now whether the Executive has the power to seize American citizens in civilian settings in the United States and militarily detain them indefinitely without criminal charge or trial, this Court will necessarily give prosecutors and defendants guidance about the legitimacy or illegitimacy of the enemy combatant threat in plea negotiations. By contrast, denying this petition (and thus delaying final resolution of the question of Presidential power militarily to detain citizens) would

significantly prolong uncertainty over the legitimacy of terror-related convictions nationwide.

B. Expedited Consideration by the Court of Appeals Is Not Enough

Three federal courts have had the benefit of full briefing and argument and have decided Padilla's claim that the President has no power militarily to detain American citizens seized on American soil in a civilian setting: the Southern District of New York, the Second Circuit Court of Appeals, and District of South Carolina. In addition, this Court received full briefing (including a broad array of amicus briefs) on the issue of Presidential authority, and closely questioned attorneys for the Executive branch and for Petitioner on the issue little more than a year ago. In short, this is not only a question of imperative public importance, but one that has been well vetted in the federal courts. This Court is not likely to benefit further from another Court of Appeals opinion. Moreover, this is not a case in which the Court of Appeals, by ruling on some alternative issue, may render it unnecessary for this Court to decide the fundamental question presented by this petition.

Any benefit that an opinion from the Fourth Circuit might provide is more than outweighed by the costs of any further delay in this Court's final adjudication of the issue. Padilla has now spent almost three years in solitary confinement in a military brig. As this Court has made clear, the right to be free from physical detention by one's own government is among the most elemental of all liberty

interests.[6] Yet the deprivation that Padilla suffers is more than the right to be free from physical detention. He has no contact with other detainees, and he is not permitted visits from his family. The conditions of Petitioner's confinement – which at present are still set entirely by the military – have had a serious and harmful effect on Petitioner's psychological well-being and should not be continued any longer than necessary. Indeed, by the government's own public admission, the conditions of Padilla's confinement have been *deliberately crafted* to have a harmful psychological effect on him.[7] Even an expedited briefing schedule in the Fourth Circuit would leave Petitioner languishing for many months longer than is necessary.

The national costs of that delay are equally significant. Uncertainty about the scope of any Presidential military power to seize and detain citizens creates a very real danger of Executive overreach, exemplified not only by the current use of enemy combatant status in criminal plea negotiations but also by the very real possibility that many more citizens could be detained as enemy combatants should the nation face another moment of acute crisis like September 11, 2001. Moreover, it leaves our Nation's lawmakers in Congress, and the voters they represent,

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[6] *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action"); *see also Parham v. J. R.*, 442 U.S. 584, 600 (1979) (noting the "substantial liberty interest in not being confined unnecessarily").

[7] Decl., *in* Joint Appendix at 75, 86, *Rumsfeld v. Padilla*, 124 S.Ct. 2711 (2004) (No. 03-1027) (describing the "sense of dependency and trust" interrogators were attempting to create by keeping Padilla isolated from the outside world and denying him access to counsel).

uncertain about which branch of government has responsibility for determining how citizens suspected of association with terrorists should be treated. This uncertainty saps the vitality of democratic processes precisely at a moment in history when they are most necessary. As much as in *Youngstown*, the real-world context of this legal issue strongly counsels this Court taking the opportunity to resolve the issue at the soonest possible moment.[8] Only this Court – not the Court of Appeals – can provide the definitive answer the nation needs to the momentous and pressing constitutional questions presented by this case.

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[8] Indeed, denying this petition for certiorari before judgment could engender a long wait for the resolution of the legal uncertainty. Were the Executive branch to prevail in the Fourth Circuit Court of Appeals, it might choose to bring criminal charges against Padilla and transfer him to civilian custody in an attempt to moot the issue and avoid this Court's review. Such a path would allow the Executive to detain any citizen for a year or more – the period it would take for a habeas petition to work its way through to an adjudication by the Court of Appeals and back to this Court, at which point the government could again choose to press criminal charges or release the suspect. Granting this petition for certiorari before judgment would prevent the Executive from establishing such a system of *de facto* executive detentions. *See* Joel Brinkley & Eric Lichtblau, *U.S. Releases Saudi-American It Had Captured in Afghanistan*, N.Y. TIMES, Oct. 12, 2004, at A15 (reporting Executive Branch decision to release Yaser Hamdi in exchange for his relinquishment of U.S. citizenship rather than engage in evidentiary hearings ordered by this Court). Moreover, delay increases the chance that Padilla could be faced with an unconstitutionally coerced choice – for example, whether to plead guilty to a crime or to give up other rights in order to avoid further months of detention as an enemy combatant.

CONCLUSION

For the reasons set forth above, this petition for a writ of certiorari before judgment should be granted.

Respectfully submitted,

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April 7, 2005

[SEAL]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

JOSE PADILLA,	§	CIVIL ACTION NO.
Petitioner,	§	2:04-2221-26AJ
	§	
vs.	§	
	§	
COMMANDER C.T. HANFT, USN Commander, Consolidated Naval Brig,	§	
	§	
	§	
Respondent.	§	

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

This is a 28 U.S.C. § 2241 *habeas corpus* action. The Court has jurisdiction over the matter pursuant to 28 U.S.C. § 1331. Pending before the Court is Petitioner's Motion for Summary Judgment as to Counts One and Two.[1] The sole question before the Court today is whether the President of the United States (President) is authorized to detain an United States citizen as an enemy combatant under the unique circumstances presented here.

[1] In Count One of the petition, Petitioner claims that his detention without being criminally charged violates the United States Constitution, including the Fourth, Fifth and Sixth Amendments, as well as the *habeas* suspension clause found in Article Two and the treason clause found in Article III. In Count Two of the petition, Petitioner maintains that his detention violates the Non-Detention Act. 18 U.S.C. § 4001(a).

II. FACTUAL AND PROCEDURAL HISTORY

A. Factual history

The relevant facts as briefly recited by the Supreme Court in *Rumsfeld v. Padilla*, 124 S.Ct. 2711, 2715-16 (2004) are as follow:

> On May 8, 2002, Padilla flew from Pakistan to Chicago's O'Hare International Airport. As he stepped off the plane, Padilla was apprehended by federal agents executing a material witness warrant issued by the United States District Court for the Southern District of New York (Southern District) in connection with its grand jury investigation into the September 11th terrorist attacks. Padilla was then transported to New York, where he was held in federal criminal custody. On May 22, acting through appointed counsel, Padilla moved to vacate the material witness warrant.
>
> Padilla's motion was still pending when, on June 9, the President issued an order to Secretary of Defense Donald H. Rumsfeld designating Padilla an "enemy combatant" and directing the Secretary to detain him in military custody. App. D to Brief for Petitioner 5a (June 9 Order). In support of this action, the President invoked his authority as "Commander in Chief of the U.S. armed forces" and the Authorization for Use of Military Force Joint Resolution, Pub.L. 107-40, 115 Stat. 224 (AUMF),[2] enacted by Congress on September

[2] The AUMF provides in relevant part: "[T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any

(Continued on following page)

18, 2001. June 9 Order 5a. The President also made several factual findings explaining his decision to designate Padilla an enemy combatant.[3] Based on these findings, the President concluded that it is "consistent with U.S. law and the laws of war for the Secretary of Defense to detain Mr. Padilla as an enemy combatant." *Id.*, at 6a.

That same day, Padilla was taken into custody by Department of Defense officials and transported to the Consolidated Naval Brig in Charleston, South Carolina.[4] He has been held there ever since.

Further, for the purposes of this proceeding, except where noted, the parties, in an October 20, 2004, filing with this Court titled "Stipulations of Fact," have agreed to the following facts:

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future acts of international terrorism against the United States by such nations, organizations or persons." 115 Stat. 224.

[3] In short, the President "[d]etermine[d]" that Padilla (1) "is closely associated with al Qaeda, an international terrorist organization with which the United States is at war;" (2) that he "engaged in . . . hostile and war-like acts, including . . . preparation for acts of international terrorism" against the United States; (3) that he "possesses intelligence" about al Qaeda that "would aid U.S. efforts to prevent attacks by al Qaeda on the United States"; and finally, (4) that he "represents a continuing, present and grave danger to the national security of the United States," such that his military detention "is necessary to prevent him from aiding al Qaeda in its efforts to attack the United States." June 9 Order 5a-6a.

[4] Also on June 9, the Government notified the District Court *ex parte* of the President's Order; informed the court that it was transferring Padilla into military custody in South Carolina and that it was consequently withdrawing its grand jury subpoena of Padilla; and asked the court to vacate the material witness warrant. *Padilla ex rel. Newman v. Rumsfeld*, 233 F.Supp.2d 564, 571 (S.D.N.Y. 2002). The court vacated the warrant. Ibid.

1. On May 8, 2002, petitioner Padilla boarded a flight in Zurich, Switzerland, bound for O'Hare International Airport, Chicago, Illinois. Agents of the Federal Bureau of Investigation (FBI) had become aware of which flight petitioner would be taking from Zurich to Chicago and monitored petitioner during the flight and upon his arrival at O'Hare International Airport.[5]

2. At approximately 12:55 P.M. (C.D.T.),[6] May 8, 2002, the United States District Court for the Southern District of New York issued a material witness warrant for petitioner's arrest in connection with grand jury proceedings.

3. Petitioner arrived at O'Hare International Airport on the flight from Zurich at approximately 1:00 P.M. (C.D.T.), May 8, 2002, wearing civilian clothing and carrying no weapons or explosives.

4. Passengers arriving on international flights at O'Hare International Airport must proceed to the Federal Inspection Service (FIS) area within the international arrivals terminal. The FIS area contains both an immigration inspection area and customs inspection area.

5. Passengers must first proceed to the immigration inspection area. Petitioner cleared the immigration inspection area where his United States passport was stamped "admitted" by an Immigration Inspector.

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[5] Petitioner does not stipulate to the content of paragraphs 1 and 2. Paragraphs 1 and 2 are factual averments of the respondent.

[6] Petitioner does not stipulate to the times indicated in any paragraph. The references to particular times are factual averments of the respondent.

6. Petitioner then proceeded to the customs inspection area. After an initial interview with a Customs Inspector, petitioner was questioned further by Customs Inspectors in an interview room within the customs inspection area.

7. Subsequently, while remaining in the same interview room, petitioner was interviewed by FBI agents. Petitioner's interview with the FBI agents began at approximately 3:15 P.M. (C.D.T.).

8. At approximately 7:05 P.M. (C.D.T.), petitioner declined to continue the interview without the representation of an attorney.

9. At approximately 7:35 P.M. (C.D.T.), while remaining in the same interview room, petitioner was presented with a grand jury subpoena in connection with grand jury proceedings in the Southern District of New York.

10. At approximately 8:10 P.M. (C.D.T.), while remaining in the same interview room, petitioner was arrested by the interviewing agents pursuant to the material witness warrant that had been issued by the United States District Court for the Southern District of New York.

11. After his arrest, petitioner was transferred to the custody of the United States Marshals Service for detention. The United States Marshals Service transported petitioner to New York City and incarcerated him in the Metropolitan Correctional Center, a civilian facility.

12. On June 9, 2002, the district court vacated the material witness warrant and petitioner was transferred to military control.

B. Procedural history

On June 11, Padilla's counsel, claiming to act as his next friend, filed in the Southern District a habeas corpus petition under 28 U.S.C. § 2241. The petition, as amended, alleged that Padilla's military detention violates the Fourth, Fifth, and Sixth Amendments and the Suspension Clause, Art. I, § 9, cl. 2, of the United States Constitution. The amended petition named as respondents President Bush, Secretary Rumsfeld, and Melanie A. Marr,[7] Commander of the Consolidated Naval Brig.

The Government moved to dismiss, arguing that Commander Marr, as Padilla's immediate custodian, is the only proper respondent to his habeas petition, and that the District Court lacks jurisdiction over Commander Marr because she is located outside the Southern District. On the merits, the Government contended that the President has authority to detain Padilla militarily pursuant to the Commander in Chief Clause of the Constitution, Art. II, § 2, cl. 1, the congressional AUMF, and this Court's decision in *Ex parte Quirin,* 317 U.S. 1, 63 S.Ct. 1, 87 L.Ed. 3 (1942).

The District Court issued its decision in December 2002. *Padilla ex rel. Newman v. Bush*, 233 F.Supp.2d 564. The court held that the Secretary's "personal involvement" in Padilla's military custody renders him a proper respondent to Padilla's habeas petition, and that it can assert jurisdiction over the Secretary under New York's

[7] Commander Marr has since been replaced by Commander C.T. Hanft.

long-arm statute, notwithstanding his absence from the Southern District. *Id.*, at 581-587. On the merits, however, the court accepted the Government's contention that the President has authority to detain as enemy combatants citizens captured on American soil during a time of war. *Id.*, at 587-599.

The Court of Appeals for the Second Circuit reversed. 352 F.3d 695 (2003). The court agreed with the District Court that Secretary Rumsfeld is a proper respondent, reasoning that in cases where the habeas petitioner is detained for "other than federal criminal violations, the Supreme Court has recognized exceptions to the general practice of naming the immediate physical custodian as respondent." *Id.*, at 704-708. The Court of Appeals concluded that on these "unique" facts Secretary Rumsfeld is Padilla's custodian because he exercises "the legal reality of control" over Padilla and because he was personally involved in Padilla's military detention. *Id.*, at 707-708. The Court of Appeals also affirmed the District Court's holding that it has jurisdiction over the Secretary under New York's long-arm statute. *Id.*, at 708-710.

Reaching the merits, the Court of Appeals held that the President lacks authority to detain Padilla militarily. *Id.*, at 710-724. The court concluded that neither the President's Commander-in-Chief power nor the AUMF authorizes military detentions of American citizens captured on American soil. *Id.*, at 712-718, 722-723. To the contrary, the Court of Appeals found in both our case law and in the Non-Detention Act, 18 U.S.C. § 4001(a), a strong presumption against domestic military detention of citizens absent explicit congressional authorization. 352 F.3d, at 710-722.

> Accordingly, the court granted the writ of habeas corpus and directed the Secretary to release Padilla from military custody within 30 days. *Id.*, at 724. [The United States Supreme Court] granted the Government's petition for certiorari to review the Court of Appeals' rulings with respect to the jurisdictional and the merits issues, both of which raise[d] important questions of federal law. 540 U.S. ___, 1173, 124 S.Ct. 1353, 157 L.Ed.2d 1226 (2004).

Padilla, 124 S.Ct. at 2716-17 (footnotes omitted).

On June 28, 2004, the Supreme Court ruled "[t]he District of South Carolina, not the Southern District of New York, was the district court in which Padilla should have brought his habeas petition. We therefore reverse the judgment of the Court of Appeals and remand the case for entry of an order of dismissal without prejudice." *Id.* at 2727.

This case was commenced on July 2, 2004, with the filing of the petition discussed herein. Respondent filed his Answer on August 30, 2004.

On October 20, 2004, Petitioner filed a Motion for Summary Judgment to Counts One and Two of his Petition, as well as his Memorandum of Law in Support of the Motion (Petitioner's Motion). The parties jointly submitted their Stipulations of Fact on the same day. Subsequently, on November 22, 2004, Respondent filed his Opposition to Petitioner's Motion (Respondent's Opposition). Petitioner filed a Reply to Respondent's Opposition on December 13, 2004. Oral arguments were held on January 5, 2005. The case is now ripe for adjudication.

III. STANDARD OF REVIEW

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The moving party bears this initial burden of informing the Court of the basis for its motions, and identifying those portions of the record "which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The Court reviews the record by drawing all inferences most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citing *United States v. Diebold, Inc.*, 369 U.S. 654 (1962)).

"Once the moving party carries its burden, the adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response . . . must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). The adverse party must show more than "some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. If an adverse party completely fails to make an offer of proof concerning an essential element of that party's case on which that party will bear the burden of proof, then all other facts are necessarily rendered immaterial and the moving party is entitled to summary judgment. *Celotex*, 477 U.S. at 322-23. Hence, the granting of summary judgment involves a three-tier analysis. First, the Court determines whether a genuine issue actually exists so as to necessitate a trial. FED. R. CIV. P. 56(e). An

issue is genuine "if the evidence is such that a reasonable [trier of fact] could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Second, the Court must ascertain whether that genuine issue pertains to material facts. FED. R. CIV. P. 56(e). The substantial law of the case identifies the material facts, that is, those facts that potentially affect the outcome of the suit. *Anderson*, 477 U.S. at 248. Third, assuming no genuine issue exists as to the material facts, the Court will decide whether the moving party shall prevail solely as a matter of law. FED. R. CIV. P. 56(e).

Summary judgment is "properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." *Celotex*, 477 U.S. at 327. The primary issue is whether the material facts present a sufficient disagreement as to require a trial, or whether the facts are sufficiently one-sided that one party should prevail as a matter of law. *Anderson*, 477 U.S. at 251-52. The substantive law of the case identifies which facts are material. *Id.* at 248. Only disputed facts potentially affecting the outcome of the suit under the substantive law preclude the entry of summary judgment.

IV. CONTENTIONS OF THE PARTIES

Petitioner maintains that Congress has not authorized the indefinite detention without trial of citizens arrested in the United States. He also argues that the President's inherent constitutional powers do not allow him to subject United States citizens who are arrested in the United States to indefinite military detention.

Conversely, respondent contends that the President has the constitutional authority to detain Petitioner as an enemy combatant without charging him criminally. Furthermore, according to Respondent, the Non-Detention Act, 18 U.S.C. § 4001(a), does not constrain the President's authority to detain Petitioner as an enemy combatant.

V. DISCUSSION

A. Three Supreme Court cases

Respondent maintains that the decisions of the Supreme Court in *Hamdi v. Rumsfeld*, 124 S.Ct. 2633 (2004) and *Quirin*, 317 U.S. 1 "reaffirm the military's long-settled authority – independent of and distinct from the criminal process – to detain enemy combatants for the duration of a given armed conflict, including the current conflict against al Qaeda." Respondent's Opposition at 8. According to Respondent, "[t]hose decisions squarely apply to this case." *Id.* Petitioner, on the other hand, maintains that *Ex parte Milligan*, 71 U.S. (4 Wall) 2 (1866) is controlling. The Court will consider each case in turn.

1. Hamdi

The petitioner in *Hamdi* was an American citizen captured while on the battlefield in Afghanistan. In that case, the Supreme Court had before it the threshold question of "whether the Executive has the authority to detain citizens who qualify as 'enemy combatants.'" *Hamdi*, 124 S.Ct. at 2639.

While the Court noted that there was some debate and no full exposition by the Government of the proper scope of the term "enemy combatant," it was clear in

Hamdi that, the "enemy combatant that [the Government was] seeking to detain [was] an individual who, it alleg[d], was part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there." *Hamdi*, 124 S.Ct. at 2639 (internal quotation marks and citations omitted). The Court also noted that, "the basis asserted for detention by the military is that Hamdi was *carrying a weapon against American troops on a foreign battlefield*; that is, that he was an enemy combatant." *Id.* at 2642 n.1 (emphasis added).

Against this backdrop, the Supreme Court found that authority existed to detain Mr. Hamdi. The Court reasoned,

> [t]here is no bar to this Nation's holding one of its own citizens as an enemy combatant. . . . A citizen, no less than an alien, can be "part of or supporting forces hostile to the United States or coalition partners" and "engaged in an armed conflict against the United States," Brief for Respondents 3; such a citizen, if released, would pose the same threat of returning to the front during the ongoing conflict.
>
> In light of these principles, it is of no moment that the AUMF does not use specific language of detention. Because detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, in permitting the use of "necessary and appropriate force," Congress has clearly and unmistakably authorized detention *in the narrow circumstances considered here.*

Hamdi, 124 S.Ct. at 2640-41 (emphasis added).

Thus, it is true that, under some circumstances, such as those present in *Hamdi*, the President can indeed hold an United States citizen as an enemy combatant. Just because something is sometimes true, however, does not mean that it is always true. The facts in this action bear out that truth.

In the instant case, Respondent would have this Court find more similarities between Petitioner here and the petitioner in *Hamdi* than actually exist. As two other courts have already found, however, the differences between the two are striking.

The first to distinguish the difference was Judge Wilkinson when he noted that "[t]o compare this battlefield capture [in *Hamdi*] to the domestic arrest in *Padilla v. Rumsfeld* is to compare apples and oranges." *Hamdi v. Rumsfeld*, 337 F.3d 335, 344 (4th Cir. 2003) (Wilkinson, J., concurring). Not long thereafter, the Supreme Court, in responding to Justice Scalia's dissent, specifically noted "Justice Scalia largely ignores the context of [*Hamdi*]: a United States citizen captured in a *foreign* combat zone." *Hamdi*, 124 S.Ct at 2643 (emphasis in original).[8]

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[8] In fact, in the plurality opinion, Justice O'Connor noted at least nine additional times that the Court's holding that Mr. Hamdi's detention as an enemy combatant was constitutionally permissible was limited to the facts of that case. *Id.* at 2635 ("Congress authorized the detention of combatants in the *narrow circumstances* alleged here.") (emphasis added); *Id.* at 2639 ("We therefore answer only the *narrow question* before us.") (emphasis added); *Id.* at 2639-40 ("[W]e conclude that the AUMF is explicit congressional authorization for the detention of individuals in the *narrow category* we describe.") (emphasis added); *Id.* at 2640 ("We conclude that the detention of individuals falling within the *limited category* we are considering . . . is an exercise of the 'necessary and appropriate force' Congress has authorized the President

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Nevertheless, Respondent would have the Court find that the place of capture is of no consequence in determining whether the President can properly hold Petitioner as an enemy combatant. According to that view, it would be illogical to find that Petitioner could evade his detention as an enemy combatant status just because he returned to the United States before he could be captured. The cogency of this argument eludes the Court.

In *Hamdi*, the petitioner was an American citizen who was captured on the battlefield. Petitioner is also an American citizen, but he was captured in an United States airport. He is, in some respects, being held for a crime that he is alleged to have planned to commit in this country.[9] No one could rightfully argue that "[t]he exigencies of military action on the battlefield present an entirely different set of circumstances than the arrest of a citizen arriving at O'Hare International Airport." Brief of *Amici*

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to use.") (emphasis added); *Id.* at 2641 ("Congress has clearly and unmistakably authorized detention in the *narrow circumstances* considered here.") (emphasis added); *Id.* at 2642 ("*Ex parte Milligan* . . . does not undermine our holding about the Government's authority to seize enemy combatants, *as we define that term today.*") (emphasis added); *Id.* at 2642 n.1 ("Here the basis asserted for detention by the military is that Hamdi was *carrying a weapon against American troops on a foreign battlefield;* that is, that he was an enemy combatant.") (emphasis added); *Id.* at 2643 (noting with disapproval that "Justice Scalia finds the *fact of battlefield capture* irrelevant. . . .") (emphasis added); *Id.* ("Justine Scalia can point to no case or other authority for the proposition that those *captured on a foreign battlefield* . . . cannot be detained outside the criminal process.") (emphasis added).

[9] The Court finds Respondent's argument concerning whether Petitioner had actually entered the country unavailing. Respondent has not provided, and this Court has not found, any case law that supports Respondent's position that an United States citizen, is not "in" the United States when he or she is "in" a United States airport. Such a failure is fatal to the claim.

Curiae Janet Reno et al. at 5, *Padilla*, 124 S.Ct. 2711 (No. 03-1027).

It cannot be disputed that the circumstances in *Hamdi* comport with the requirement of the AUMF, which provides that "the President is authorized to use all *necessary and appropriate force* against those . . . persons, in order to prevent attacks by al Qaeda on the United States." That is, the President's use of force to capture Mr. Hamdi was necessary and appropriate. Here, that same use of force was not.

Again, Petitioner in this action was captured in the United States. His alleged terrorist plans were thwarted at the time of his arrest. There were no impediments whatsoever to the Government bringing charges against him for any one or all of the array of heinous crimes that he has been effectively accused of committing. Also at the Government's disposal was the material witness warrant. In fact, the issuance of a material witness warrant was the tool that the law enforcement officers used to thwart Petitioner's alleged terrorist plans. Therefore, since Petitioner's alleged terrorist plans were thwarted when he was arrested on the material witness warrant, the Court finds that the President's subsequent decision to detain Petitioner as an enemy combatant was neither necessary nor appropriate. As accurately observed by counsel for Petitioner,

> [i]t's not necessary because the criminal justice system provides for the detention power. Nothing makes that clearer than the facts of this case. There was a warrant issued from a grand jury for Mr. Padilla's arrest. Mr. Padilla was arrested by law enforcement officials, civilian law enforcement officials. He was brought before a civilian

> judge. He was imprisoned in a civilian facility in New York. Everything occurred according to the civilian process in the way it is supposed to. And it's not only not necessary, but not appropriate. It's not appropriate because it directly conflicts with the limits on detention that [C]ongress has set by statute and the limits that the framers set on presidential power.

Transcript of January 5, 2005 hearing at 5:6-5:17.

2. Quirin

Quirin involves the *habeas* petitions of seven German soldiers, all of whom had lived in the United States at some point in their lives. The soldiers came to the United States bent on engaging in military sabotage. One of the seven, Haupt, claimed to be an American citizen.

In denying the soldiers' petitions, the Supreme Court held that "Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war." *Id.* at 37.

Respondent maintains that *Quirin* is wholly on point and, thus, for purposes of this motion, is controlling. The Court is unconvinced.

Although seemingly similar to the instant case, it is, in fact, like *Hamdi*, starkly different. As the Second Circuit has already noted, "the *Quirin* Court's decision to uphold military jurisdiction rested on the express congressional authorization of the use of military tribunals to try combatants who violated the law." *Hamdi*, 352 F.3d 695, 715-16.

> From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals. By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases. Congress, in addition to making rules for the government of our Armed Forces, has thus exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals. And the President, as Commander in Chief, by his Proclamation in time of war has invoked that law. By his Order creating the present Commission he has undertaken to exercise the authority conferred upon him by Congress, and also such authority as the Constitution itself gives the Commander in Chief, to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war.

Quirin, 317 U.S. at 27-28 (footnote omitted).

Respondent goes to great lengths to argue that the Court is *Quirin* did not rest its decision on a "clear statement from Congress." Respondent's Opposition at 22. The Court is unconvinced.

Contrary to Respondent's argument, it is clear from *Quirin* that the Court found that Congress had "explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases." *Id.* at 28. Therefore, since no such Congressional authorization is present here, Respondent's argument as to the application of *Quirin* must fail.[10]

3. Ex parte Milligan

> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity

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[10] Other differences include, but are not limited to, the fact that:

1) In *Quirin,* Mr. Quirin was charged with a crime and tried by a military tribunal. In the instant case, Petitioner has not been charged and has not been tried.

2) *Quirin* involves a prisoner whose detention was punitive whereas Petitioner's detention is purportedly preventative.

3) *Quirin* is concerned more with whether the petitioner was going to be tried by a military tribunal or a civilian court. The case at bar is concerned with whether Petitioner is going to be charged and tried at all.

4) The decision in *Quirin* preceded the Non-Detention Act.

5) *Quirin* involved a war that had a definite ending date. The present war on terrorism does not.

> on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence.

Id. at 12-21.

Ex parte Milligan involves a United States citizen during the Civil War who was neither a resident of one of the Confederate states, nor a prisoner of war, but a citizen of Indiana for twenty years. He had never been in the military or naval service. Milligan was arrested while at home.

The Court held in *Milligan* that the military commission lacked any jurisdiction to try Milligan when the civilian "courts are open and their process unobstructed." *Id.* at 121. The President may not unilaterally establish military commissions in wartime "because he is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws." *Id.* at 121.[11]

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[11] The court in *Hamdi*, 124 S.Ct. at 2642, observed, however, that the *Milligan* court

> made repeated reference to the fact that its inquiry into whether the military tribunal had jurisdiction to try and punish Milligan turned in large part on the fact that Milligan was not a prisoner of war, but a resident of Indiana arrested while at home there. That fact was central to its conclusion. Had Milligan been captured while he was assisting Confederate soldiers by carrying a rifle against Union troops on a Confederate battlefield, the holding of the Court might well have been different. The Court's repeated explanations that Milligan was not a prisoner of war suggest that had these different circumstances been present he could have been detained under military authority for the duration of the conflict, whether or not he was a citizen.

(citation and footnote omitted).

While not directly on point, and limited by *Quirin*, *Milligan's* greatest import to the case at bar is the same as that found in *Quirin:* the detention of a United States citizen by the military is disallowed without explicit Congressional authorization.

B. The Non-Detention Act, 18 U.S.C. § 4001(a)

The Non-Detention Act, also referred to as the "Railsback Amendment," after its author Representative Railsback, provides that "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." 18 U.S.C. § 4001(a).

Respondent asserts that the Non-Detention Act does not constrain the President's authority to detain Petitioner as an enemy combatant. He contends that 1) the Joint Resolution for Authorization for Use of Miliary Force (AUMF), passed by Congress on September 18, 2001, is an "Act of Congress" authorizing Petitioner's detention and 2) the Non-Detention Act does not apply to the military's detention of the military's wartime detention of enemy combatants to fulfill this statute. The Court finds these contentions to be without merit.

1. Authorization

The AUMF provides, in relevant part, that

> [t]he President is authorized to use all *necessary and appropriate* force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against

> the United States by such nations, organizations or persons.

Joint Resolution § 2(a) (emphasis added).

When interpreting a statute, this Court begins "where all such inquiries must begin: with the language of the statute itself." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). In clear and unambiguous language, the Non-Detention Act forbids *any* kind of detention of an United States citizen, except that which is specifically allowed by Congress. *Howe v. Smith*, 452 U.S. 473, 479 n.3 (1981) ("[T]he plain language of § 4001(a) proscrib[es] detention of *any kind* by the United States, absent a congressional grant of authority to detain.") (emphasis in original). Contrary to Respondent's contentions otherwise, the Court finds that 1) the AUMF does not authorize Petitioner's detention and 2) Petitioner's present confinement is in direct contradiction to the mandate of the Non-Detention Act.

As the Second Circuit stated,

> While it may be possible to infer a power of detention from the Joint Resolution in the battlefield context where detentions are necessary to carry out the war, there is no reason to suspect from the language of the Joint Resolution that Congress believed it would be authorizing the detention of an American citizen already held in a federal correctional institution and not arrayed against our troops in the field of battle.

Padilla, 352 F.3d at 723 (internal quotation marks and citation omitted).

To be more specific, whereas it may be a necessary and appropriate use of force to detain a United States

citizen who is captured on the battlefield, this Court cannot find, in narrow circumstances presented in this case, that the same is true when a United States citizen in arrested in a civilian setting such as an United States airport.

In sum, "[i]n interpreting a war-time measure we must assume that [the purpose of Congress and the Executive] was to allow for the greatest possible accommodation between those liberties and the exigencies of war." *Ex parte Endo*, 323 U.S. 283, 300 (1944). "We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used." *Id.* In the case *sub judice*, there is no language in the AUMF that "clearly and unmistakably" grants the President the authority to hold Petitioner as an enemy combatant. Therefore, Respondent's argument must fail.[12]

Respondent next argues that,

> Even if there were any doubt about whether the AUMF encompasses combatants seized within the United States, such doubt would be resolved in favor of the President's determination that Congress did in fact authorize petitioner's detention. President's Order, Preamble (declaring that petitioner's detention is "consistent with the laws

[12] To the extent that Respondent maintains that the Non-Detention Act was impliedly repealed by the AUMF, the Court rejects the argument. It is black letter law that repeal of a statute by implication is strongly disfavored in the law.

of the United States, including the Authorization for Use of Military Force").

Respondent's Opposition at 26.

Certainly Respondent does not intend to argue here that, just because the President states that Petitioner's detention is "consistent with the laws of the United States, including the Authorization for Use of Military Force" that makes it so. Not only is such a statement in directcontravention to the well settled separation of powers doctrine, it is simply not the law. Moreover, such a statement is deeply troubling. If such a position were ever adopted by the courts, it would totally eviscerate the limits placed on Presidential authority to protect the citizenry's individual liberties.

2. Application to wartime detention

In arguing that the Non-Detention Act has no application to Petitioner, Respondent first maintains that the placement the Act – in Title 18 ("Crimes and Criminal Procedure"), with directions regarding the Attorney General's control over federal prisons, and not in Title 10 ("Armed Forces") or Title 50 ("War and National Defense") – indicates that it speaks only to civilian detentions. Second, Respondent argues that the legislative history of the Non-Detention Act renders the same result. The Court is unpersuaded by either argument. Simply stated, the statute is clear, simple, direct and ambiguous. It forbids *any* kind of detention of an United States citizen, except that it be specifically allowed by Congress. Therefore, since Petitioner's detention has not been authorized by Congress, Respondent's argument must again fail.

C. Inherent authority

Having found that the Non-Detention Act expressly forbids the President from holding Petitioner as an enemy combatant, and that the AUMF does not authorize such detention, neither explicitly nor by implication, the Court turns to the question of whether the President has the inherent authority to hold Petitioner.

Respondent states that

> The Commander-in-Chief Clause grants the President the power to defend the Nation when it is attacked, and he "is bound to accept the challenge without waiting for any special legislative authority." *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1862). An essential aspect of the President's authority in this regard is to "determine what degree of force the crisis demands." *Id.* at 670; see *Campbell v. Clinton*, 203 F.3d 19, 27 (D.C. Cir.) (Silberman, J., concurring) ("[T]he President has independent authority to repel aggressive acts by third parties even without specific congressional authorization, and courts may not review the level of force selected."), cert. denied, 531 U.S. 815 (2000). The President's decision to detain petitioner as an enemy combatant represents a basic exercise of his authority as Commander in Chief to determine the level of force needed to prosecute the conflict against al Qaeda.

Respondent's Opposition at 10.

As a preliminary matter, the Court strongly agrees that "great deference is afforded the President's exercise of his authority as Commander-in-Chief." *Hamdi*, 352 F.3d at 712 (internal citation omitted). However, "[w]here the

exercise of Commander-in-Chief powers, no matter how well intentioned, is challenged on the ground that it collides with the powers assigned by the Constitution to Congress, a fundamental role exists for the courts." *Hamdi*, 352 F.3d at 713 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803).

Pursuant to the seminal case of *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952), in a case such as this, where the President has taken steps that are inconsistent with the will of Congress – both express and implied – the President's authority is "at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Youngstown*, 343 U.S. at 637.

Simply stated, Respondent has not provided, and this Court has not found, any law that supports the contention that the President enjoys the inherent authority pursuant to which he claims to hold Petitioner. The *Prize* cases are chiefly concerned with enemy property, not enemy combatants, and *Campbell* concerns air strikes in another country. Obviously, neither of those issues are present here. Thus, the Court finds the two cases of little guidance.

As Justice Jackson stated, "Congress, not the Executive, should control utilization of the war power as an instrument of domestic policy." *Youngstown*, 343 U.S. at 644 (Jackson, J., concurring). "There are indications that the Constitution did not contemplate that the title Commander-in-Chief of the Army and Navy will constitute [the President] also Commander-in-Chief of the country, its industries and its inhabitants. *Id.* at 643-44.

Accordingly, and limited to the facts of this case, the Court is of the firm opinion that it must reject the position posited by Respondent. To do otherwise would not only offend the rule of law and violate this country's constitutional tradition, but it would also be a betrayal of this Nation's commitment to the separation of powers that safeguards our democratic values and individual liberties.

For the Court to find for Respondent would also be to engage in judicial activism. This Court sits to interpret the law as it is and not as the Court might wish it to be. Pursuant to its interpretation, the Court finds that the President has no power, neither express nor implied, neither constitutional nor statutory, to hold Petitioner as an enemy combatant.

D. Other matters and concerns

1. A law enforcement matter

It is true that there may be times during which it is necessary to give the Executive Branch greater power than at other times. Such a granting of power, however, is in the province of the legislature and no one else – not the Court and not the President. "The Founders of this Nation entrusted the law making power to the Congress alone in both good and bad times." *Youngstown,* 343 U.S. at 589. "[A] state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." *Hamdi*, 124 S.Ct. at 2650 (internal citation omitted).

Simply stated, this is a law enforcement matter, not a military matter. The civilian authorities captured Petitioner just as they should have. At the time that Petitioner was arrested pursuant to the material arrest warrant, any alleged terrorist plans that he harbored were thwarted.

From then on, he was available to be questioned – and was indeed questioned – just like any other citizen accused of criminal conduct. This is as it should be.

There can be no debate that this country's laws amply provide for the investigation, detention and prosecution of citizen and non-citizen terrorists alike. For example, in his dissenting opinion in *Hamdi*, 124 S.Ct. at 2664, Justice Scalia lists the following criminal statutes that are available to the Government in fighting terrorism: 18 U.S.C. § 2381 (the modern treason statute which essentially tracks the language of the constitutional provision); 18 U.S.C. § 32 (destruction of aircraft or aircraft facilities); 18 U.S.C. § 2332a (use of weapons of mass destruction); 18 U.S.C. § 2332b (acts of terrorism transcending national boundaries); 18 U.S.C. § 2339A (providing material support to terrorists); 18 U.S.C. § 2339B (providing material support to certain terrorist organizations); 18 U.S.C. § 2382 (misprision of treason); 18 U.S.C. § 2383 (rebellion or insurrection); § 2384 (seditious conspiracy); 18 U.S.C. § 2390 (enlistment to serve in armed hostility against the United States); 31 CFR § 595.204 (2003) (prohibiting the "making or receiving of any contribution of funds, goods, or services" to terrorists); and 50 U.S.C. § 1705(b) (criminalizing violations of 31 CFR § 595.204). In his concurrence, in addition to these statutes, Justice Souter lists 18 U.S.C. § 3142(e) (pretrial detention). *Id.* at 2657.[13]

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[13] As for concerns about national security during the judicial process, it is axiomatic that the government has a legitimate interest in the protection of the classified information that may be necessarily be used in the prosecution of an alleged terrorist such as Petitioner. This Court is of the firm opinion, however, that federal law provides robust protection of any such information. *E.g.* The Classified Information Procedures Act (CIPA), 18 U.S.C. App. III.

> [I]n declaring Padilla an enemy combatant, the President relied upon facts that would have supported charging Padilla with a variety of offenses. The government thus had the authority to arrest, detain, interrogate, and prosecute Padilla apart from the extraordinary authority it claims here. The difference between invocation of the criminal process and the power claimed by the President here, however, is one of accountability. The criminal justice system requires that defendants and witnesses be afforded access to counsel, imposes judicial supervision over government action, and places congressionally imposed limits on incarceration.

Amici Curiae at 3.

2. Suspension of the writ of habeas corpus

"The Privilege of the Writ of *Habeas Corpus* shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Const. Art. 1, § 9, cl. 2. This power belongs solely to Congress. Since Congress has not acted to suspend the writ, and neither the President nor this Court have the ability to do so, in light of the findings above, Petitioner must be released.

3. Other measures

If the law in its current state is found by the President to be insufficient to protect this country from terrorist plots, such as the one alleged here, then the President should prevail upon Congress to remedy the problem. For instance, if the Government's purpose in detaining Petitioner as an enemy combatant is to prevent him from "returning to the field of battle and taking up arms once

again[,]" *Hamdi*, 124 S.Ct at 2640, but the President thinks that the laws do not provide the necessary and appropriate measures to provide for that goal, then the President should approach Congress and request that it make proper modifications to the law. As Congress has already demonstrated, it stands ready to carefully consider, and often accommodate, such significant requests.

VI. CONCLUSION

Accordingly, in light of the foregoing discussion and analysis, it is the judgment of this Court that Petitioner's Motion for Summary Judgment on Counts One and Two of the Petition, as well as his Petition for a writ of *habeas corpus* must be **GRANTED**. Accordingly, Respondent is hereby directed to release Petitioner from his custody within forty-five (45) days of the entry of this Order.[14]

IT IS SO ORDERED.

Signed this 28th day of February, 2005, in Spartanbug, South Carolina.

/s/ Henry F. Floyd
HENRY F. FLOYD
UNITED STATES
DISTRICT JUDGE

[14] Of course, if appropriate, the Government can bring criminal charges against Petitioner or it can hold him as a material witness.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Jose Padilla,	)	
Petitioner	)	
v.	)	**C/A No. 02:04-2221-26AJ**
Commander C.T. Hanft, U.S.N. Commander, Consolidated Naval Brig,	)	**NOTICE OF APPEAL**
Respondent	)	

Notice is hereby given that the Respondent, above named, hereby appeals to the United States Court of Appeals for the Fourth Circuit from the Summary Judgment Order of The Honorable Henry F. Floyd, United States District Court Judge, entered in this case on the 28th day of February 2005.

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March 11, 2005

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA	:	
-vs-	:	Cr. No. 05-53
AHMED OMAR ABU ALI	:	
Defendant.	:	

DETENTION HEARING
March 1, 2005
Before: Liam O'Grady, Magistrate Judge

APPEARANCES:

David H. Laufman, Robert Spencer and Jerry DeMaio, Counsel for the United States
John Zwerling and Andrea Moseley, Counsel for Defendant
The Defendant, Ahmed Omar Abu Ali, in person

* * *

[60] Q. Or statements.

A. Statements, I have seen parts of one statement.

Q. Are you aware that – Let me ask you this.

Did you tell my client that if he didn't cooperate with you, he could be designated an enemy combatant and transported to a military facility?

A. I explained to him the second day of interviews the three options that we laid out, and one of them was that he could be declared an enemy combatant.

* * *

The Constitutional Provisions, Treaties, Statutes, Ordinances, And Regulations Involved In The Case Include The Following:

18 U.S.C. § 4001(a) states:

> No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.

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28 U.S.C. § 1254(1) states:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

---

28 U.S.C. § 2101(e) states:

> (e) An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001) states:

Joint Resolution

To authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States.

Whereas, on September 11, 2001, acts of treacherous violence were committed against the United States and its citizens; and

Whereas, such acts render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad; and

Whereas, in light of the threat to the national security and foreign policy of the United States posed by these grave acts of violence; and

Whereas, such acts continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States; and

Whereas, the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This joint resolution may be cited as the "Authorization for Use of Military Force."

SECTION 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.

(a) IN GENERAL – That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned,

authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

(b) War Powers Resolution Requirements –

(1) SPECIFIC STATUTORY AUTHORIZATION – Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.

(2) APPLICABILITY OF OTHER REQUIREMENTS – Nothing in this resolution supercedes any requirement of the War Powers Resolution.

(2)

Supreme Court, U.S.
FILED
MAY 9 - 2005
OFFICE OF THE CLERK

No. 04-1342

In the Supreme Court of the United States

JOSE PADILLA, PETITIONER

v.

C.T. HANFT, UNITED STATES NAVY COMMANDER, CONSOLIDATED NAVAL BRIG

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Court should grant certiorari before judgment to determine whether the President has authority to detain petitioner as an enemy combatant.

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In the Supreme Court of the United States

No. 04-1342

JOSE PADILLA, PETITIONER

v.

C.T. HANFT, UNITED STATES NAVY COMMANDER, CONSOLIDATED NAVAL BRIG

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the district court (Pet. App. 1a-29a) is not yet published in the *Federal Supplement*, but is available at 2005 WL 465691.

JURISDICTION

The judgment of the district court was entered on March 4, 2005. The notice of appeal was filed on March 11, 2005 (Pet. App. 30a). The petition for a writ of certiorari before judgment was filed on April 7, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2101(e).

STATEMENT

The President ordered the Secretary of Defense to detain petitioner militarily, as an enemy combatant, based on information that petitioner closely associated with al Qaeda, engaged in hostile and war-like acts, and presented

a grave continuing danger to the national security of the United States. The legality of petitioner's detention is currently before the United States Court of Appeals for the Fourth Circuit, which granted the parties' joint motion to expedite the government's appeal from an order of the district court (subsequently stayed by that court) directing petitioner's release. Petitioner nonetheless seeks to short-circuit that process of orderly review by asking this Court to grant certiorari before judgment in a case in which petitioner prevailed in the district court. Because that extraordinary request is without merit, the petition should be denied.

1. On September 11, 2001, the United States endured a foreign enemy attack more savage, deadly, and destructive than any previously sustained by the Nation on any one day in its history. That morning, agents of the al Qaeda terrorist network hijacked four commercial airliners and crashed three of them into targets in the Nation's financial center and seat of government. The fourth crashed in rural Pennsylvania due to the heroic efforts of the passengers. The attacks killed approximately 3000 persons, injured thousands more, destroyed billions of dollars in property, and exacted a heavy toll on the Nation's infrastructure and economy.

Congress and the President took immediate action to defend the country and prevent additional attacks. Congress swiftly enacted its support of the President's use of "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 * * * in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Authorization for Use of Military Force (AUMF), Pub. L.

No. 107-40, § 2(a), 115 Stat. 224. The AUMF recognized the President's "authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States," and emphasized that it is "both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad." *Id.*, Pmbl.

Soon after the AUMF's enactment, the President expressly confirmed that the September 11 attacks "created a state of armed conflict" with al Qaeda. Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, § 1(a). He ordered the armed forces of the United States to subdue the al Qaeda network, as well as the Taliban regime in Afghanistan that supported it. In the course of those armed conflicts, the United States military, consistent with the Nation's settled practice in times of war, has seized and detained numerous persons who were fighting for and associated with the enemy.

2. Petitioner is one such person detained as an enemy combatant. In 2000, petitioner attended the al Qaeda-affiliated al-Farouq training camp just north of Kandahar, Afghanistan. Rapp Decl. (Exh. B to Answer) para. 8. After successfully completing that training, petitioner spent three months just north of Kabul, Afghanistan, guarding what petitioner understood to be a Taliban outpost while armed with a Kalashnikov assault rifle. *Ibid.*

In 2001, Mohammed Atef, a senior al Qaeda operative, asked petitioner to undertake a mission to blow up apartment buildings in the United States. Rapp Decl. para. 11. Petitioner agreed to the mission and received further training from an al Qaeda explosives expert. *Ibid.*

When the United States commenced combat operations against the Taliban and al Qaeda, petitioner and other al

Qaeda operatives moved from safehouse to safehouse in Afghanistan to avoid bombing or capture, and later began moving towards Afghanistan's mountainous border with Pakistan in order to evade United States forces and air strikes. Rapp Decl. para. 10. Armed with an assault rifle, petitioner took cover with other operatives in a network of caves and bunkers near Khowst, Afghanistan, and was eventually escorted into Pakistan by Taliban personnel. *Ibid.*

Soon after entering Pakistan, petitioner met with senior Osama bin Laden lieutenant Abu Zubaydah to discuss the possibility of conducting terrorist operations in the United States. Rapp Decl. para. 10. Zubaydah sent petitioner to Karachi, Pakistan, to meet with Khalid Sheikh Mohammad (KSM), al Qaeda's operations leader. *Id.* para. 12. KSM suggested that petitioner revive the plan to detonate apartment buildings, as petitioner had initially discussed with Atef. *Ibid.* Petitioner accepted the assignment, and KSM gave him full authority to conduct the operation. *Ibid.* Before departing for the United States, petitioner received training from Ramzi Bin al-Shibh, a senior al Qaeda operative, on the secure use of telephones and e-mail protocols. *Ibid.* Al Qaeda operatives also gave petitioner $15,000, travel documents, a cell phone, and an e-mail address to notify al Qaeda facilitator Ammar al-Baluchi upon arrival in the United States. *Ibid.*

On May 8, 2002, petitioner flew from Zurich, Switzerland, to Chicago's O'Hare International Airport, where he was detained and arrested in the customs inspection area pursuant to a material witness warrant. Petitioner had been monitored by FBI agents in the Zunich airport and on the plane. Stipulations of Fact paras. 3, 6, 10. Petitioner was carrying $10,526 in currency, the cell phone that he had

been given, and the e-mail address that he was to use to update al-Baluchi. Rapp Decl. para. 13.

On June 9, 2002, the President—as Commander in Chief and pursuant to the AUMF—made a formal determination that petitioner "is, and at the time he entered the United States in May 2002 was, an enemy combatant." President's Order para. 1 (Exh. A to Answer). The President found, in particular, that petitioner: is "closely associated with al Qaeda, an international terrorist organization with which the United States is at war," *id.* para. 2; has "engaged in * * * hostile and war-like acts, including conduct in preparation for acts of international terrorism" against the United States, *id.* para. 3; "possesses intelligence" about al Qaeda that "would aid U.S. efforts to prevent attacks by al Qaeda on the United States," *id.* para. 4; and "represents a continuing, present and grave danger to the national security of the United States," such that his detention "is necessary to prevent him from aiding al Qaeda in its efforts to attack the United States or its armed forces, other governmental personnel, or citizens," *id.* para. 5.

Consistent with those findings, the President directed the Secretary of Defense "to receive [petitioner] from the Department of Justice and to detain him as an enemy combatant." President's Order. Immediately upon issuance of that directive, the Department of Justice moved to vacate the material witness warrant. That motion was granted, and petitioner was transferred to military control and taken to the Consolidated Naval Brig in Charleston, South Carolina, where he has since been detained.

3. On June 11, 2002, petitioner's counsel filed on his behalf a habeas corpus petition in the Southern District of New York. Pet. App. 6a. The district court held that it had jurisdiction and that the President had legal authority to detain petitioner as an enemy combatant. *Padilla ex rel.*

Newman v. *Bush*, 233 F. Supp. 2d 564 (S.D.N.Y.), aff'd in part, rev'd in part and remanded, 352 F.3d 695 (2d Cir. 2003), rev'd, 124 S. Ct. 2711 (2004).

The United States Court of Appeals for the Second Circuit agreed that the Southern District of New York had jurisdiction. *Padilla* v. *Rumsfeld*, 352 F.3d 695, 702-710 (2d Cir. 2003), rev'd, 124 S. Ct. 2711 (2004). On the merits, however, the court held over a dissent that the President lacks authority to detain petitioner as an enemy combatant. See *id.* at 710-724 (majority opinion); *id.* at 726-733 (Wesley, J., concurring in part and dissenting in part).

This Court granted certiorari, and held that the Southern District of New York lacked jurisdiction and the habeas petition should have been filed in the District of South Carolina. *Rumsfeld* v. *Padilla*, 124 S. Ct. 2711, 2717-2727 (2004). This Court therefore declined to reach the question whether the President has authority to detain petitioner as an enemy combatant. *Id.* at 2715.

4. a. On July 2, 2004, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the District of South Carolina. Petitioner alleged, among other things, that his military detention violates: (i) the Constitution, because American citizens arrested in the United States may be detained only pursuant to the criminal process; and (ii) 18 U.S.C. 4001(a)—which provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress"—because the AUMF does not authorize his detention.

The government filed an answer detailing the legal and factual bases for petitioner's detention as an enemy combatant. Attached to that answer was the August 27, 2004, Declaration of Jeffrey N. Rapp, the Director of the Joint Intelligence Task Force for Combating Terrorism.

The Rapp Declaration includes information and intelligence that were not available during the earlier litigation in the Second Circuit and this Court. Among other things, the Rapp Declaration makes clear that petitioner not only came to the United States to commit terrorist attacks, but also had associated with al Qaeda and the Taliban, and evaded capture by United States armed forces, on the battlefields of Afghanistan—facts that had not been available during the previous litigation. See Rapp Decl. paras. 8-12; pp. 3-4, *supra*.

On October 20, 2004, petitioner filed a motion for summary judgment arguing that he is "entitled to judgment as a matter of law even if all of the facts pleaded [in the Rapp Declaration] are assumed to be true." Pet. Mem. in Supp. of Mot. for Summ. J. 1. Accordingly, the parties have not yet undertaken any discovery. Instead, they have assumed, for purposes of petitioner's motion, that all of the facts set forth in the Rapp declaration are true. See *id.* at 1, 2 n.1; Gov't Opp. to Mot. for Summ. J. 3 n.1; 9/14/04 Tr. 37-38; *id.* at 23-24, 27-36.

b. On February 28, 2005, the district court granted the summary judgment motion and habeas petition and ordered that petitioner be released from custody or charged with a crime. Pet. App. 29a & n.14. The court concluded that, notwithstanding this Court's decision in *Hamdi* v. *Rumsfeld*, 124 S. Ct. 2633 (2004), the AUMF does not provide a sufficiently clear authorization for petitioner's detention. It held that Congress must speak in clear and unmistakable terms when it authorizes the President to detain enemy combatants, *id.* at 16a-18a, 21a, and that the AUMF does not clearly authorize petitioner's detention because it authorizes the use of only "necessary and appropriate" force. *Id.* at 21a-22a. In the district court's view, military detention is not necessary and appropriate

because petitioner is a United States citizen who was not captured on a battlefield, but instead was captured in a civilian setting in the United States. *Id.* at 15a, 21a-22a. The court further concluded that the President lacks inherent authority as Commander in Chief to detain petitioner as an enemy combatant. *Id.* at 24a-25a.

5. The government timely filed a notice of appeal on March 11, 2005, Pet. App. 30a, and on the same day filed a motion for a stay of the district court's order pending appeal. The district court granted the stay on April 6, 2005. On April 25, 2005, the Fourth Circuit granted the parties' joint motion to expedite consideration of the appeal. Under the court's expedited schedule, the government filed its opening brief on May 6, 2005, and briefing will be completed by June 21, 2005. Although the Fourth Circuit had not planned to hear any oral arguments between May and September 2005, it scheduled a special hearing for the argument in this case on July 19, 2005.

ARGUMENT

Petitioner seeks (Pet. 6-18) the extraordinary remedy of certiorari before judgment despite having prevailed in the district court. This Court's Rules make clear that such an extraordinary petition will not be granted unless it meets the stringent criteria for this Court's immediate intervention. See Sup. Ct. R. 11 (such petition "will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court"). Those criteria are not satisfied here. The court of appeals granted the parties' joint motion for expedited review, and will hear argument and may well render a decision before this Court returns from its summer recess; any review by this Court will be

aided by the court of appeals' consideration of the issues involved; and that consideration may foreclose any need for this Court's intervention. Accordingly, the petition for a writ of certiorari before judgment should be denied.

1. Petitioner's arguments in favor of certiorari before judgment all depend on the assumption that bypassing the court of appeals would materially expedite the resolution of his claims. Now that the court of appeals has granted the parties' joint motion for expedition, however, that assumption does not appear to be correct. The government has already filed its opening brief in the court of appeals, and that court has demonstrated its commitment to expedition by scheduling a special sitting in order to hear oral argument on July 19, 2005—approximately two months before the Fourth Circuit was scheduled to resume hearing arguments after a break in its schedule over the summer, and approximately two-and-a-half months before this Court is expected to resume hearing arguments after its summer recess. In the related *Hamdi* litigation, the Fourth Circuit similarly demonstrated a strong commitment to expedition by deciding each appeal in a matter of weeks. See *Hamdi* v. *Rumsfeld*, 316 F.3d 450 (4th Cir. 2003) (decided approximately ten weeks after argument), vacated, 124 S. Ct. 2633 (2004); *Hamdi* v. *Rumsfeld*, 296 F.3d 278 (4th Cir. 2002) (decided less than three weeks after argument); *Hamdi* v. *Rumsfeld*, 294 F.3d 598 (4th Cir. 2002) (decided approximately three weeks after argument).

As a result, the court of appeals may well issue its decision before this Court returns from its summer recess, or shortly thereafter. Even if the Fourth Circuit were to proceed on a more deliberate schedule, this Court should still have plenty of time to consider this case during the 2005 Term if the decision is adverse to petitioner and he decides to forego en banc review. For example, this Court

was able to hear and decide this very case before the end of the October 2003 Term, even though the Second Circuit did not issue its opinion until December 18, 2003. See *Rumsfeld* v. *Padilla*, 540 U.S. 1173 (2004) (expediting the briefing schedule); *Rumsfeld* v. *Padilla*, 540 U.S. 1159 (2004) (same). Thus, there is no reason to prevent the Fourth Circuit from considering the appeal on an expedited basis— as it has made special arrangements to do.

2. This Court could benefit substantially from the court of appeals' review of this case in its current posture.

a. Although petitioner contends (Pet. 6) that "[n]othing has changed" since this case last came before this Court, the record has changed substantially. As explained above, the government now possesses evidence that petitioner engaged in armed combat against United States and Coalition forces by taking up arms and affiliating himself with both al Qaeda and Taliban forces on the battlefields of Afghanistan during the time that our forces were engaged in combat operations there. See pp. 6-7, *supra*. Petitioner took cover in Afghanistan with other al Qaeda operatives in order to evade United States forces on the ground in Afghanistan as well as United States airstrikes. See *id.* at 3-4. Armed with an assault rifle, he later traveled with other al Qaeda operatives to Afghanistan, escorted by Taliban personnel. See *ibid.* Those critical facts were not available to the courts that previously considered petitioner's claims. See, *e.g.*, *Padilla* v. *Rumsfeld*, 352 F.3d 695, 700-701 (2d Cir. 2003) (reciting the factual allegations then in the record), rev'd, 124 S. Ct. 2711 (2004).

Those new facts are especially material in light of this Court's decision in *Hamdi*, which upheld the President's authority to detain a United States citizen who affiliated with a Taliban military unit in Afghanistan and remained with that unit following the attacks of September 11, 2001.

124 S. Ct. at 2637. If the military had captured and detained petitioner when he was still carrying an assault rifle on the battlefields of Afghanistan, this case could not be distinguished from *Hamdi*. The question whether petitioner could somehow shed that enemy combatant status by evading capture by United States forces in Afghanistan, and coming to the United States to launch more attacks here on behalf of al Qaeda, has thus far been addressed by a single judge—in the district court opinion below. Indeed, *no* court of appeals has yet had occasion to apply this Court's *Hamdi* decision in *any* enemy combatant case. Thus, this case presents important legal issues that have not yet been vetted by courts other than the district court below, in this case or in any other. See generally pp. 17-20, *infra*.[1]

This Court has addressed other important issues arising out of the war on terrorism after full consideration by the court of appeals. See, *e.g.*, *Hamdi* v. *Rumsfeld*, 124 S. Ct. 2633 (2004); *Rumsfeld* v. *Padilla*, 124 S. Ct. 2711 (2004); *Rasul* v. *Bush*, 124 S. Ct. 2686 (2004). This Court has also rejected prior requests for premature review in such cases. See, *e.g.*, *Hamdan* v. *Rumsfeld*, 125 S. Ct. 972 (2005) (denying petition for certiorari before judgment in enemy combatant case); *Moussaoui* v. *United States*, 125 S. Ct. 1670 (2005) (denying interlocutory petition for certiorari). There is no reason to follow a different course here.

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[1] The lack of any appellate precedent applying *Hamdi* distinguishes this case from others relied on by petitioner (Pet. 8, 11-12) in which this Court granted certiorari before judgment in light of conflicting lower court decisions. See, *e.g.*, *United States* v. *Fanfan*, 125 S. Ct. 12 (2004) (courts of appeals were in conflict and the Court also granted review of a court of appeals judgment in a companion case); *Dames & Moore* v. *Regan*, 453 U.S. 654, 667-668 (1981) (district court's order enjoining the Executive was contrary to holdings of two courts of appeals).

b. Review by the court of appeals would not only provide helpful guidance, it could also (contrary to petitioner's contention) "render it unnecessary for this Court to decide the fundamental question presented by this petition." Pet. 15. As noted above, the parties have assumed for purposes of petitioner's motion for summary judgment that the factual averments of the Rapp Declaration are true. See p. 7, *supra*. If the court of appeals were to hold that the President possesses authority to detain petitioner on those assumed facts, it would necessarily remand for further proceedings, including discovery and factfinding. Because such a decision would be interlocutory, this Court might well choose to deny certiorari at that time and await the outcome of the factual proceedings on remand. Indeed, if the lower courts ultimately disagreed with the averments of the Rapp Declaration, this Court's review might never be warranted—and, at a minimum, the factual development in the lower courts would focus the issues before this Court.

Such concerns about judicial economy have long animated this Court's reluctance to consider legal claims presented in an interlocutory posture, even in petitions taken after a court of appeals judgment. See *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (interlocutory status of case "alone furnished sufficient ground for the denial" of the petition); *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., concurring).

The rationale underlying this Court's general practice applies with special force in the circumstances of this case. Here, petitioner has taken the extraordinary step of seeking certiorari before judgment to ask the Court to make potentially unnecessary determinations affecting the exercise of the President's core Commander-in-Chief and

foreign affairs authorities. Cf. *Ashwander* v. *TVA*, 297 U.S. 288, 346-348 (1936) (Brandeis, J., concurring) (explaining that whenever possible, this Court will avoid passing upon a constitutional question). This Court's "reluctance to decide constitutional issues is especially great where, as here, they concern the relative powers of coordinate branches of government." *Public Citizen* v. *Department of Justice*, 491 U.S. 440, 466 (1989). That admonition has particular force with respect to matters involving foreign affairs, because "[f]oreign policy [is] the province and responsibility of the Executive." *Christopher* v. *Harbury*, 536 U.S. 403, 417 (2002) (internal quotation marks omitted). Especially in this context, where this Court has admonished the lower courts to "proceed with * * * caution," *Hamdi*, 124 S. Ct. at 2652 (plurality opinion), there is no reason to depart from the normal orderly process of appellate review.

3. a. Petitioner has not advanced a compelling argument to the contrary. Although petitioner cites (Pet. 12-15) a supposed need for immediate guidance regarding, *inter alia*, "the legitimacy or illegitimacy of the [government's purported use of] the enemy combatant threat in plea negotiations" in "terror-related criminal prosecutions nationwide," any decision in this case would likely have only limited relevance to such a diverse array of cases—most of which involve non-citizens, and none of which present the facts at issue here—especially in light of this Court's decision in *Hamdi*.

In *Hamdi*, a majority of the Court recognized the authority of the President to detain at least some citizens as enemy combatants. Moreover, as noted above, the controlling plurality opinion stressed that the lower courts should "proceed with the caution that we have indicated is necessary in this setting" by "engaging in a factfinding process that is both prudent and incremental." 124 S. Ct.

at 2652. Thus, "[t]he permissible bounds of the [enemy-combatant] category will be defined by the lower courts as subsequent cases are presented to them." *Id.* at 2642 n.1.

The lower courts are now doing just that. Depending on the court of appeals' decision, this Court's intervention may or may not eventually be warranted on the facts currently presented here. But there is no cause for pretermitting the lower courts' process, much less for assuming that any decision by this Court would apply broadly to many other enemy combatants. The question presented itself illustrates that point by focusing (Pet. i) on petitioner's United States citizenship and locus of capture. Since September 11, 2001, there have been only two cases (this one and *Hamdi*) involving United States citizens detained militarily in the United States as enemy combatants.[2]

Petitioner therefore errs in relying (Pet. 8, 12) on *United States* v. *Fanfan*, 125 S. Ct. 12 (2004), and *Mistretta* v. *United States*, 488 U.S. 361 (1989), in which this Court granted certiorari before judgment to determine the constitutionality of the Sentencing Guidelines under which *all* federal defendants are sentenced. If anything, the far more modest scope of the decision below serves only to underscore the inappropriateness of certiorari before judgment in this case.

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[2] Significantly, petitioner and Hamdi both associated with enemy forces while carrying assault rifles on the battlefields of Afghanistan, and petitioner also attempted to enter this country for the purpose of committing further attacks. See pp. 3-4, *supra*; *Hamdi*, 124 S. Ct. at 2637. As such, petitioner's alarmist contention (Pet. 9-10) that the Executive claims authority to designate individuals as enemy combatants because they gave charitable contributions intended for orphans or taught English to terrorists' offspring—a contention based solely on snippets from a transcript in a different case taken out of context—is wholly misplaced.

b. Petitioner's reliance (Pet. 11-12) on the institutional concerns of the Legislative and Executive Branches is especially misplaced. Congress remains free to act at all times (and in fact has done so by authorizing the President to use "all necessary and appropriate force" "to protect United States citizens both at home and abroad," AUMF, Pmbl., § 2(a)). Although the district court's decision marks a substantial judicial intrusion into the core Presidential function of determining how best to ensure the Nation's security (see pp. 19-20, *infra*), the Executive has determined that expedited review by the court of appeals will protect the government's interests at this time, a fact which further underscores the fact-specific nature of the district court's decision. The Executive is uniquely positioned to make that determination because, unlike a private litigant, the Executive has the responsibility to oversee this Nation's foreign relations and its fighting of an overseas war. Accordingly, petitioner's reliance on cases in which the government sought or acceded to a request for certiorari before judgment is misplaced. See Pet. 8 & n.5, 10-11 (citing *United States* v. *Nixon*, 418 U.S. 683, 686-687 (1974); *Kinsella* v. *Krueger*, 351 U.S. 470, 473 (1956); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 937 (1952) (per curiam); *United States* v. *United Mine Workers*, 330 U.S. 258, 269 (1947); *United States* v. *Bankers Trust Co.*, 294 U.S. 240, 294-295 (1935)).

c. Petitioner's reliance (Pet. 10-11) on *Ex parte Quirin*, 317 U.S. 1 (1942), is likewise misplaced. Although this Court granted certiorari before judgment in *Quirin*, the petitioners there faced imminent execution. Petitioner does not face such a fate. Petitioner contends (Pet. 15-16) that he "has now spent almost three years in solitary confinement in a military brig," and review by the court of appeals would subject him to custody "for many months longer than

necessary." But it is unlikely that the court of appeals' expedited proceedings during this Court's summer recess will delay final resolution of the petition by "many months"; it is much more likely that the court of appeals' review will not cause any material delay. See pp. 9-10, *supra*.

Even if a delay of several months were to result, petitioner would not suffer irreparable harm because the granting of the writ would not entitle petitioner to release from federal custody in any event. Instead, petitioner would simply be entitled to a transfer from one type of custody (military) to another (civilian). See Pet. App. 29a n.14 ("[T]he Government can bring criminal charges against Petitioner or it can hold him as a material witness."); *id.* at 27a (listing crimes with which petitioner could potentially be charged). For that reason as well, petitioner's reliance on a liberty interest in release from confinement (Pet. 15-16) is misplaced.[3]

4. Although the petition does not argue the merits of petitioner's claims, a brief discussion of the merits helps to demonstrate both the substantial nature of the government's arguments for reversal of the district court's decision and the benefit that would accrue from permitting the ordinary appellate process to take its course. The same arguments, of course, are currently before the court of appeals, and should be left for that court's expedited resolution in the first instance.

The President has statutory and constitutional authority to detain petitioner as an enemy combatant. In *Hamdi*,

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[3] Although petitioner now contends (Pet. 16) that the conditions of his confinement have had a serious and harmful effect on his psychological well-being, petitioner has never challenged the conditions of his confinement in any judicial proceeding, or otherwise contended that he has been treated inhumanely. Instead, petitioner has challenged only the fact of his military detention, not its nature.

this Court confirmed that the military may seize and detain enemy combatants, including United States citizens, for the duration of the relevant conflict with al Qaeda. Specifically, this Court upheld the President's authority, under the AUMF, to detain as an enemy combatant a presumed American citizen who "was 'part of or supporting forces hostile to the United States or coalition partners' in Afghanistan and who 'engaged in an armed conflict against the United States' there." 124 S. Ct. at 2639 (plurality opinion); accord *id.* at 2679 (Thomas, J., dissenting). That describes petitioner perfectly. Petitioner, like Hamdi, carried an assault rifle on the battlefields of Afghanistan. Petitioner, moreover, associated himself not just with Taliban forces (as did *Hamdi*), but with al Qaeda itself at a time when the United States was engaged in armed conflict against those forces. See pp. 3-4, *supra*. Thus, he is an enemy combatant under *Hamdi*.

The district court drew the opposite conclusion on the ground that petitioner was not *captured* in Afghanistan, but instead was captured in what the court considered to be a civilian setting in the United States. See Pet. App. 13a-14a. The district court cited no authority for the proposition that locus of capture is dispositive. Nor did it attempt to explain how petitioner could shed his enemy combatant status by escaping from United States forces in Afghanistan and coming to this country bent on commiting *more* hostile acts. Instead, the court stated that "the cogency of [the government's] argument eludes this Court." Pet. App. 14a. Perhaps as a result, the district court never articulated a theory as to how petitioner's evasion of United States forces in Afghanistan, and choice to come here to commit further hostile acts, could possibly make him *less* of an enemy combatant.

Indeed, those actions make him *more* of an enemy combatant, because he falls not only with this Court's definition of enemy combatant employed in *Hamdi*, but also within the scope of this Court's holding in *Quirin* that "[c]itizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of * * * the law of war." 317 U.S. at 37-38. By closely associating with al Qaeda, receiving training from al Qaeda, and coming to the United States at al Qaeda's direction and with its assistance to advance the conduct of attacks against the United States (see pp. 3-4, *supra*), petitioner placed himself squarely within that definition of enemy combatant.

The district court attempted to distinguish *Quirin* on the ground that "the *Quirin* Court's decision to uphold military jurisdiction rested on * * * express congressional authorization," whereas in this case "no such Congressional authorization is present." Pet. App. 16a, 18a (internal quotation marks omitted). But even assuming *arguendo* that a clear congressional statement is required, Congress provided one in the AUMF, which broadly authorizes the President "to use *all* necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 * * * in order to prevent *any* future acts of international terrorism against the United States by such nations, organizations or persons." § 2(a) (emphases added).[4] As

[4] In any event, *Quirin* did not require a clear statement of congressional intent to authorize military detentions. Quite the opposite is true: the Court noted that a "detention * * * ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war" is "not to be set aside by the courts

this Court held in *Hamdi*, "Congress' grant of authority for the use of 'necessary and appropriate force' * * * include[s] the authority to detain for the duration of the relevant conflict." 124 S. Ct. at 2641 (plurality opinion); see *id.* at 2679 (Thomas, J., dissenting).

The district court nonetheless concluded that it was not "necessary and appropriate" to detain petitioner as an enemy combatant because he was captured in the United States. Pet. App. 15a. That remarkable conclusion not only intrudes on the Commander in Chief's authority to determine what force is necessary and appropriate, see, *e.g.*, *Fleming* v. *Page*, 50 U.S. (9 How.) 603, 615 (1850); not only reads the AUMF's *grant* of authority as a limitation of authority; and not only ignores almost 200 years of jurisprudence in which phrases like "necessary and appropriate" have been read broadly, not in a narrow restrictive sense, see, *e.g.*, *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat) 316, 421 (1819); it also ignores Congress's determination in the AUMF that it *is* "necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens *both at home and abroad*." AUMF, Pmbl. (emphasis added). Congress's manifest intent was to authorize actions to prevent another terrorist attack in *this* country. See § 2(a), 115 Stat. 224. Indeed, Congress was directly responding to attacks on the United States homeland, launched a week earlier by combatants within the Nation's borders. Accordingly, the AUMF cannot plausibly be read to authorize detentions abroad while simultaneously withholding support for the detention

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without the clear conviction that [it is] in conflict with the * * * laws of Congress." 317 U.S. at 25. Nor does 18 U.S.C. 4001(a) require a clear statement, because that statute addresses only the detention of citizens by civilian authorities; it does not purport to restrict the military's longstanding authority to detain enemy combatants.

of combatants found within the United States—*i.e.*, combatants identically situated to those who carried out the September 11 attacks.

Even if the AUMF did not authorize petitioner's detention with sufficient clarity, the President would still have inherent authority as Commander in Chief to order the military detention of combatants affiliated with al Qaeda who enter the United States bent on committing hostile and warlike acts. Notwithstanding the district court's contrary conclusion (Pet. App. 24a-26a), the Commander-in-Chief Clause grants the President the power to defend the Nation when it is attacked, including the authority to "determine what degree of force the crisis demands." *The Prize Cases*, 67 U.S. (2 Black) 635, 670 (1863); see *Campbell* v. *Clinton*, 203 F.3d 19, 27 (D.C. Cir.) (Silberman, J., concurring), cert. denied, 531 U.S. 815 (2000).

Even this brief review of the issues underscores the benefit of permitting the court of appeals to undertake expedited review. The court of appeals' decision would provide guidance on sensitive issues of first impression that implicate important considerations of national security. The court of appeals might also resolve the government's appeal in ways that could make further review inappropriate or unnecessary at this time. Consideration by the courts of appeals streamlined the litigation in the earlier round of this litigation as well as in *Hamdi* and *Rasul*, and is now sharpening similarly sensitive issues in *Hamdan* v. *Rumsfeld*, another enemy combatant case in which this Court recently denied a petition for certiorari before judgment. See 125 S. Ct. 972 (2005). There is no reason to follow a different course here.

CONCLUSION

The petition for a writ of certiorari before judgment should be denied.

Respectfully submitted.

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In The
Supreme Court of the United States

JOSE PADILLA,

Petitioner,

v.

COMMANDER C.T. HANFT,
U.S.N., COMMANDER,
CONSOLIDATED NAVAL BRIG,

Respondent.

On Petition For Writ Of Certiorari Before Judgment To The United States Court Of Appeals For The Fourth Circuit

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ARGUMENT

The government cannot deny that this case "involves issues of extraordinary national significance." Gov't Pet. for Cert., *Rumsfeld v. Padilla*, at 11. The prolonged failure of the judicial system to give a definitive answer to the important question presented in this case creates an uncertainty that is damaging to public confidence in the rule of law. This Court should grant certiorari now to end that uncertainty.

I. Granting Certiorari Now Will Expedite Resolution of this Case

Contrary to the Government's assertion, it would expedite resolution of this case if the Court were to grant certiorari now and set the case down for argument in October. While Mr. Padilla is appreciative of the fact that the Fourth Circuit granted the parties' joint motion for expedited review and agreed to hear oral argument on July 19, 2005, waiting for the Fourth Circuit to decide the case will prolong the proceedings in this Court by six months at a minimum. Even if the Fourth Circuit issues a decision in the same amount of time it took to issue the *Hamdi* merits decision (ten weeks), *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003), this Court is not likely to be able to review the petition for certiorari until late fall and the case is not likely to be argued until late next spring – a year from now, two years since this Court first heard full briefing and argument on the merits of the case, and nearly four years since Mr. Padilla was first unconstitutionally detained.[1] Given the extraordinary importance of the issues presented, and the fact that this litigation has

[1] Should the Fourth Circuit or this Court rule that the case should be remanded for further proceedings, the case could drag on for years longer, undermining public confidence in the capacity of the judiciary to provide timely protection for a citizen's constitutional rights in the context of the "war on terror."

already worked its way through the full appellate process to this Court once before, the costs of such delay far exceed any benefits.

II. There Has Been No Change Since 2004

A. The Government's "New" Facts are Immaterial to the Question Presented

1. There is no merit to the government's claim that "the record has changed substantially" since this case was last before this Court. Gov't Opp. Cert. at 10. As explained below in Part II.B, the government's "new" facts are not new at all, but simply represent a change in the emphasis the government has placed on various parts of the record. More fundamentally, however, the government's "new" facts are irrelevant because they have no bearing on the question decided by the district court and presented by this petition: whether the President has the power to seize American citizens in civilian settings on American soil and subject them to indefinite military detention without criminal charge or trial? This precise question was presented the last time this Court heard the case. The only fact that is material to the question presented is that Padilla was arrested unarmed in a civilian setting in the United States; that fact is undisputed, and has not changed.

2. Nor has the law changed. The government insists that there is no reason to distinguish between a military capture on a foreign battlefield and the kind of arrest at issue in this case, where a citizen was arrested in a civilian setting in the United States on the basis of information from confidential sources. To the contrary, basic constitutional principles, a wealth of case law, and common sense support the proposition that the President's powers in a foreign combat zone differ dramatically from his powers here at home where the courts and normal civilian processes are open and operating. Indeed this Court itself has already recognized as much, since its holding in *Hamdi v. Rumsfeld* was carefully limited to an individual who was "captured in a zone of active combat

operations" in a "foreign theater of war." 124 S.Ct. 2633, 2645 (2004); *id.* at 2643 (emphasizing that the "context of [Hamdi's] case" was that of a "battlefield capture" in a "*foreign* combat zone" (emphasis in original)).

This Court has long agreed with Alexander Hamilton that the powers conferred on the President by the Commander-in-Chief Clause "amount to nothing more than the supreme command and direction of the military and naval forces," and grant the President no sweeping authority to seize people or property within American borders even in times of war. *The Federalist* No. 69, at 418 (Clinton Rossiter, ed., 1961); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (holding that "cases upholding broad powers in military commanders engaged in day-to-day fighting in a theater of war" are inapplicable to cases involving the President's exercise of powers domestically during wartime, notwithstanding the fact that " 'theater of war' be an expanding concept."); *cf. United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-19 (1936) (distinguishing between President's powers in internal and external affairs). Allowing detention of foreign battlefield detainees without charge until the end of the armed conflict does not effect a sea change in the constitutional life of this country. Allowing the detention without charge until the end of the "war on terror" of individuals arrested in the United States based on government claims of association with enemies of the state *would* represent a dramatic change.

As the district court correctly found, Congress clearly and necessarily intended to authorize detention of persons captured on overseas battlefield when it authorized the use of "necessary and appropriate" military force in the AUMF. But Congress did *not* clearly indicate that it viewed the indefinite military detention of persons arrested in the United States based on information from secret informants as a "necessary and appropriate" use of force. This Court has consistently recognized that the Constitution requires that Congress speak clearly when it authorizes the infringement of citizens' liberties. *See, e.g., Georgia v. Ashcroft*, 501 U.S. 452, 461 (1991); *Gutknecht v.*

United States, 396 U.S. 295, 306-07 (1970) ("Where the liberties of the citizen are involved . . . we will construe narrowly all delegated powers that curtail or dilute them.") (citation omitted); *Ex parte Endo*, 323 U.S. 283, 300 (1944). Congress reinforced this clear statement requirement in 18 U.S.C. § 4001(a), guaranteeing that "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." Congress has not yet spoken with the necessary clarity to authorize such a radical erosion of Americans' freedom.

Common sense also supports a distinction between domestic arrests and battlefield captures. Individuals captured on a foreign battlefield may be more likely than not to be who the government claims they are. That is simply not the case with individuals arrested in civilian settings in the U.S. based on hearsay tips from confidential informants.

Nothing makes that clearer than the government's changing version of the "facts" in this case. The government initially emphasized its allegation that Mr. Padilla had conspired to set off a radiological dispersion device or "dirty bomb" in the United States at some unspecified point in the future. Mobbs Decl. at para. 8. The Government later claimed that Mr. Padilla had been part of a different plot to blow up apartment buildings with natural gas. Rapp Decl. at para. 8. Most recently the government has chosen to highlight the details of Padilla's alleged conduct in Afghanistan prior to his return to the United States. Gov't Opp. Cert. at 10. These factual flip-flops demonstrate the danger of allowing the government to imprison citizens indefinitely on the basis of hearsay from confidential informants[2] – and reinforces the importance of

[2] Although the government provides no information about the sources of the hearsay allegations contained in the Mobbs and Rapp declarations, voluminous press reports suggest that they were obtained under conditions that are illegal (perhaps criminal) and unlikely to produce reliable evidence. *See, e.g.*, David Johnston & James Risen, "Aides Say Memo Backed Coercion for Qaeda Cases," *N.Y. Times* (June 27, 2004) (reporting government officials acknowledging that Khalid

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testing the government's factual allegations through the well-honed procedures of criminal trial. Although the watered-down procedures suggested by the *Hamdi* plurality – including a possible presumption in favor of the government's evidence and reliance on hearsay[3] – might be sensible in the *Hamdi*-type situation of battlefield captures, such procedures are constitutionally inadequate for domestic arrests in civilian settings. Criminal procedure is what the Constitution requires.[4]

B. The Government's "New" Facts are Not New

In addition, the government's "new" facts are also not really new, further undermining the government's argument that review by the Fourth Circuit is necessary. In its appellate briefing, the government now claims that the principal basis for Padilla's detention is his alleged presence in Afghanistan during the fighting there in 2001 and 2002. Gov't Opp. at 10. Although the government's emphasis has changed, the facts have not.[5]

The Mobbs Declaration – the single piece of evidence on which the government relied three years ago during litigation before the Southern District of New York – alleged that Padilla met with an al Qaeda leader in Afghanistan in 2001 and at his direction traveled to Pakistan in 2002. Mobbs Decl. paras. 6, 9. The government

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Shaikh Mohammed was "waterboarded" – i.e., strapped to a board and submerged in water – in order to make him think he was being drowned during interrogations and reporting government officials' concerns that interrogations of Mohammed and Abu Zubaydah may have violated federal criminal law prohibiting torture.").

[3] *See Hamdi*, 124 S.Ct. at 2649 (plurality op.)

[4] It would make little sense, moreover, for the courts to create numerous different categories of enemy combatant, each entitled to slightly different, but equally ad hoc, procedural protections.

[5] Indeed, to the extent that the government is, in fact, relying on genuinely new facts and a new theory of the case to justify Padilla's detention, principles of waiver, estoppel and due process should preclude it from switching positions two years into the litigation.

made the same allegation to the Second Circuit, *see Padilla v. Rumsfeld*, 352 F.3d 695, 701 (2003) (noting government allegation that "[w]hile in Afghanistan in 2001, Padilla became involved with a plan to build and detonate a 'dirty bomb' within the United States, and went to Pakistan to receive training on explosives from al Qaeda operatives.") and this Court, *see* Petr. Br. at 32, *Rumsfeld v. Padilla*, 2004 WL 1066082, 41 U.S.L.W. 3687 (Transcript of Supreme Court Oral Argument, Apr. 28, 2004) ("Padilla was in Afghanistan and Pakistan after the attacks of September 11."). Indeed, the government's current position is puzzling in light of the fact that Acting Solicitor General Paul Clement argued before this Court a little over a year ago that Padilla's and Hamdi's cases presented identical questions in terms of presidential authority. *See id.* ("The Court: . . . [I]s Padilla just the same as someone you catch in Afghanistan? Mr. Clement: I think that for the purposes of the question before this Court, the authority question, he is just the same."). All that has really changed is that the government has now strategically chosen to emphasize certain facts rather than others in an attempt to shoehorn Padilla's case into the precedent set by this Court's decision in *Hamdi*.

C. The Government's "New" Facts Need Not Be Accepted as True

Contrary to the government's assertions, Gov't Opp. Cert. at 7, Padilla has never accepted that all of the government's factual allegations must be accepted as true for purposes of summary judgment. Rather, Padilla has consistently argued that because the government's legal position is flawed, he is entitled to judgment as a matter of law "*even if* all of the facts pleaded by the Executive Branch are assumed to be true." Petr. Mem. in Support of Motion for Summary Judgment at 1 (emphasis added); *id.* at 2 n.1; Petr. Reply (Traverse) to Resp. Answer at 2-3. But as Padilla made clear in the trial court, *see* Petr. Reply at 15, it is also a basic aspect of summary judgment practice that a party "may not rest on the mere allegations" of his pleadings when responding to a motion for summary

judgment, but rather "by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. Proc. 56(e); Petr. Reply at 15 (citing same). Affidavits opposing summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." *Id.* As Padilla pointed out in the trial court, the only affidavit submitted by the government was *not* "made on personal knowledge," *not* "admissible in evidence," and does *not* show "that the affiant is competent to testify to the matters stated therein." Fed. R. Civ. Proc. 56(e); *see* Answer 4-7; Petr. Reply at 15. The affiant (a senior government official) plainly has no first-hand knowledge of his allegations regarding Padilla, and the government has provided no information to suggest that its putative facts were obtained in any manner that would permit their introduction into evidence. The government could have tried to cure this defect in the trial court, but did not.[6] The district court did not reach this alternative basis for summary judgment because it resolved the legal issue of authority in Padilla's favor. But this argument was raised clearly below and provides an alternate ground for affirmance. *See, e.g., Smith v. Phillips*, 455 U.S. 209, 215, n.6 (1982) ("Respondent may, of course, defend the judgment below on any ground which the law and the record permit. . . .").

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[6] It is immaterial that no discovery has been conducted. *Cf.* Gov't Opp. Cert. at 7. The government does not need discovery to obtain evidence that it maintains is already within its control. Even if the government needed discovery to properly oppose the motion – and it is hard to imagine what evidence in Padilla's control it could seek to compel through civil discovery – it could have asked for it under Fed. R. Civ. Proc. 56(f). While the parties certainly contemplated that no evidentiary hearing would be held until after the summary judgment motion was resolved, it is a basic aspect of civil procedure that a party opposing summary judgment must, at a minimum, demonstrate that it has sufficient admissible evidence to create a genuine issue of fact and make an evidentiary hearing worthwhile. That is the very nature of summary judgment, and the government has not met its burden.

D. A Fourth Circuit Decision Would Not Make it Unnecessary for this Court to Pass on Important Constitutional Questions

The Fourth Circuit's decision is not likely to remove the need for this Court to decide constitutional questions of fundamental importance in this case. Contrary to the government's assertions, the current posture of the case is not interlocutory but arises from a final judgment on the merits against the government. Even were the Fourth Circuit to reverse the district court and find that the President did have authority to detain persons arrested in the U.S. as enemy combatants, that would not in any way diminish the fundamental importance of the question presented.

Moreover, any fact hearing on a remand from the Fourth Circuit would generate numerous constitutional questions about the permissibility of deviating from constitutional and statutory safeguards established in the areas of discovery, evidence, and burdens of persuasion and proof. Because it would be fundamentally unfair to require Padilla to try to prove his innocence without definitive guidance from this Court on these procedural questions,[7] the district court's resolution of these preliminary issues would likely necessitate an interlocutory appeal to this Court involving not only the current question presented, but also a raft of other complicated and novel constitutional questions. Judicial economy is best served by resolving the threshold question of Executive authority now.

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[7] *Cf. Rafeedie v. INS*, 880 F.2d 506, 517 (D.C. Cir. 1989) (holding that requiring immigration detainee to exhaust remedies by participating in summary exclusion proceeding when he was entitled to hearing with greater due process protections would irreparably harm him).

III. This Case is of Imperative Public Importance that Justifies Immediate Review in this Court

As noted in Padilla's opening brief, delaying consideration of this case would impair the ongoing administration of criminal justice by leaving the government free to wield the threat of enemy combatant status in all domestic terror prosecutions. The government is quite correct that many of the cases involving criminal plea agreements based on threats of enemy combatant status involve defendants who are alleged to have engaged in different conduct than Padilla. But because the enemy combatant category as defined by the government is so far-ranging and variable, it is unlikely that *any* case brought before this Court on certiorari will present a "typical" enemy combatant. Moreover, challenges from such individuals are unlikely to reach this Court directly, Petn. for Cert. at 13, making this case the best vehicle for review of the President's power to designate persons arrested in the United States, rather than on a foreign battlefield, as enemy combatants.

Moreover, further delaying final resolution of this case will irreparably harm Padilla. The Government responds to Padilla's contention that continuing to hold him in solitary confinement for a fourth year will cause irreparable psychological harm by arguing he "has never challenged the conditions of his confinement in any judicial proceeding, or otherwise contended that he has been treated inhumanely." Gov. Opp. at 16 n.3. That is patently untrue. Padilla has clearly asserted that his conditions of confinement "have had a serious and harmful effect on Petitioner's psychological well-being"[8] and moreover stated

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[8] *See also* Petn. for Writ of Habeas Corpus at ¶ 32 (stating that "[t]he interrogation of a prisoner throughout two years of incommunicado detention shocks the conscience and violates fundamental principles of justice that are implicit in ordered liberty" and asserting that the government's treatment of Padilla – not merely the fact of his military detention – violated his rights under the Fifth, Sixth, and Eight Amendments). It is worth noting that the government did not allow Mr. Padilla to speak to his attorneys for the first two years of his confinement, making it difficult for him to raise such issues until

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that "[s]hould [the district court] be inclined to grant a stay of its ruling pending appeal, Petitioner requests that the Court hold a hearing on the conditions of his confinement and make the issuance of the stay contingent on a modification of those conditions." Petr. Opp. to Stay Pending Appeal at 7 (March 28, 2005).[9]

In addition to clear court filings, Padilla's attorneys have sought to improve the conditions of his confinement through negotiations with military personnel responsible for the Naval Brig and attorneys in the Office of the Solicitor General. In light of the Office of Solicitor General's active involvement in these ongoing negotiations (a meeting with Padilla's attorneys on this topic was held in the Solicitor General's own conference room on March 31, 2005), the government's assertion that Padilla has never raised these claims properly is somewhat astonishing. Whether committed in error or abuse, these misstatements underscore the need for the checks and balances that the Framers established to prevent an Executive without bounds.[10]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari before judgment should be granted.

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recently. When the government eventually permitted access, it required Padilla's attorneys to sign agreements prohibiting them from asking Padilla about "information concerning the internal operations of the Brig" and "intelligence sources and methods," Access Agreement para. 2(e) and (f).

[9] The district court did not address this issue when it granted the stay pending appeal. Order Granting Respondent's Motion to Stay Pending Appeal (April 6, 2005).

[10] *Compare Rumsfeld v. Padilla*, 2004 WL 1066129 at *18 (oral argument transcript) ("our executive doesn't" torture detainees) and *Hamdi v. Rumsfeld*, 2004 WL 1066082 at *41, 41 U.S.L.W. 3687 (Transcript of Supreme Court Oral Argument, Apr. 28, 2004) ("I wouldn't want there to be any misunderstanding about this. It's also the judgment of those involved in these processes that the last thing you want to do is torture somebody or to do things along those lines.") *with* photographs broadcast hours later on *60 Minutes II* of Abu Ghraib detainees.

Respectfully submitted,

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